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The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider Its Future

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THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS AT TWENTY: A PROPOSAL FOR A LEGISLATIVE COMMISSION TO CONSIDER ITS FUTURE

Michael P. Allen⁺

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I. INTRODUCTION

As they have for generations, the men and women of the United States armed forces are serving in harm's way around the world.¹ Whether or not one supports the conflicts in which these soldiers, sailors, marines, and air force personnel are engaged, we can all agree that they deserve our gratitude and respect. And, in the slightly edited words of President Abraham Lincoln, there should also be wide consensus that society has an obligation "to care for him [and her] who shall have borne the battle and for his widow [or her widower], and his [or her] orphan."² This Article discusses the current means by which we ensure that we are faithful to President Lincoln's exhortation and how we may be able to improve that system.

1. The United States Department of Veterans Affairs and the Department of Defense provide information concerning the number of American servicemen and women who have died and been injured in conflicts from the American Revolution through the present, including what the Department refers to as the "Global War on Terror." See DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS (2008), available at <http://www.va.gov/opa/fact/docs/amwars.pdf> (providing information concerning all conflicts with the exception of the Global War on Terror); Dep't of Defense, U.S. Casualty Status, <http://www.defenselink.mil/news/casualty.pdf> (providing U.S. casualty information concerning the Global War on Terror).

2. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS 449, 450 (The Library of America ed., First Vintage Books 1992).

As any reader of newspapers or other media is no doubt aware, the care our wounded veterans receive has been the subject of much concern.³ Indeed, allegations of substandard care at Walter Reed Army Hospital led to the appointment of a commission led by former Senator Bob Dole and former Secretary of Health and Human Services Donna Shalala.⁴ The Dole-Shalala Commission eventually issued a report making several recommendations designed to streamline the process by which wounded veterans receive medical care.⁵ Whether or not sufficient steps have been taken to follow up on the Commission's recommendations remains uncertain.⁶

Of course, America's commitment to those who have served in the armed forces goes beyond the provision of medical care that has been so much in the public eye of late. That commitment includes the provision of a wide array of benefits available to veterans (as well as their dependants and survivors)⁷ under United States law.⁸ Just as the medical care America's veterans receive has come under scrutiny, so too has the process by which veterans receive these benefits.⁹

3. See, e.g., Editorial, *Anatomy of Neglect*, WASH. POST, Apr. 15, 2007, at B6; Editorial, *The Plight of American Veterans*, N.Y. TIMES, Nov. 12, 2007, at A20; Editorial, *When Warriors Come Limping Home*, N.Y. TIMES, Mar. 14, 2007, at A22; Deborah Sontag & Lizette Alvarez, *For War's Gravely Injured, A Challenge to Find Care*, N.Y. TIMES, Mar. 12, 2007, at A1; Ann Scott Tyson, *Substandard Conditions at VA Centers Noted*, WASH. POST, Apr. 15 2007, at B6.

4. See Steve Vogel, *Overhaul Urged in Care for Soldiers*, WASH. POST, July 26, 2007, at A1 (discussing appointment of Commission).

5. See PRESIDENT'S COMM'N ON CARE FOR AM.'S RETURNING WOUNDED WARRIORS, SERVE, SUPPORT, SIMPLIFY 5-11, 28 (2007), available at http://web.archive.org/web/20070924010333/www.pccww.gov/docs/kit/main_book_cc%5bJuly26%5d.pdf.

6. See, e.g., Editorial, *Wounded Warriors, Empty Promises*, N.Y. TIMES, July 25, 2008, at A20 (criticizing the failure to follow through on the Dole-Shalala Commission's recommendations).

7. In this Article, I will use the shorthand term "veteran" to refer to those persons entitled to receive benefits under United States law. In reality, the category of persons encompasses more than just the actual serviceperson, including dependants and spouses.

8. The great majority of the benefits to which veterans are entitled are codified in Title 38 of the United States Code. For a summary of many of these benefits, see VETERANS BENEFIT ADMIN., DEP'T OF VETERANS AFFAIRS, A SUMMARY OF VA BENEFITS (2006), available at <http://www.vba.va.gov/VBA/benefits/factsheets/general/21-00-1.pdf>. A more detailed description of the benefits to which veterans are entitled can be found in the 2008 edition of a Department of Veterans Affairs pamphlet entitled FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS (2008), available at <http://www.va.gov/opa/vadocs/fedben.pdf>.

9. The attention to veterans' benefits determinations is evident in the courts, Congress, and the media. See, e.g., *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1066-92 (N.D. Cal. 2008) (adjudicating claims that the veterans benefits process is unconstitutional and otherwise unlawful); *Review of Veterans Disability Compensation: Undue Delay in Claims Processing: Hearing Before the S. Comm. on Veteran's Affairs*, 110th Cong. (2008), available at http://www.veterans.senate.gov/public/index.cfm?pageid=16&release_id=11731&view=all; Christopher Lee, *Delayed Benefits Frustrate Veterans*, WASH. POST, Apr. 8, 2007, at A4 (chronicling obstacles and delays veterans have had to overcome when seeking benefits).

Attention to the veterans' benefits process is particularly timely now, as 2008 marked the twentieth anniversary of the enactment of the Veterans' Judicial Review Act of 1988 (the "VJRA").¹⁰ Before 1988, veterans dissatisfied with a Veterans' Administration determination of the benefits to which they believed they were entitled were effectively precluded from seeking judicial review of the decision.¹¹ This changed with the adoption of the VJRA. In that statute, Congress established the United States Court of Appeals for Veterans Claims (the "Veterans Court" or the "Court") under its Article I powers to provide judicial review for veterans denied benefits.¹²

As described by its first Chief Judge, the Veterans Court was a court "without any antecedent."¹³ It is not an exaggeration to say that the creation of meaningful judicial review of veterans' benefits decisions was revolutionary. It is also fair to describe the 1988 changes as experimental. After all, Congress and the President fundamentally altered a system that had existed in "splendid isolation" for nearly 200 years.¹⁴ At its heart, this Article is a call to examine the successes and shortcomings of this revolutionary experiment. It proceeds in four parts.

Part II describes the current process for obtaining veterans' benefits and, in particular, the procedures by which disputes concerning such benefit determinations are adjudicated and reviewed. After outlining the current structure of benefits determinations and judicial review, this Part considers the success and shortcomings of the endeavor over the past two decades.

Having set the current stage, Part III articulates an approach for evaluating judicial review in this area including the role of the Veterans Court. It begins

10. See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). At the same time, Congress elevated the Veterans Administration to cabinet-level status and renamed the entity the United States Department of Veterans Affairs. See Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (1988) (codified as amended in scattered sections of 38 U.S.C.).

11. See *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.'" (quoting H.R. Rep. No. 100-963, pt. 1, p. 10 (1988))). I have discussed the history of judicial review of veterans' benefits determinations in more detail elsewhere. See Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 486–88 (2007) [hereinafter Allen, *Significant Developments*].

12. See 38 U.S.C. § 7252 (2000). The Court was originally called the United States Court of Veterans Appeals. See Veterans Judicial Review Act § 4051, 102 Stat. at 4113. The Court's name was changed to the United States Court of Appeals for Veterans Claims several years later. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (1998) (codified at 38 U.S.C. § 7251). I will refer to the body under its current name throughout this Article.

13. Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 5 (1994).

14. *Brown*, 513 U.S. at 122.

by explaining why such a review is warranted even if one assumes that the current structure is functioning well. It then proceeds to call for the creation of a commission appointed by either Congress or the President to conduct a full evaluation of veterans' benefits determinations and their review. This proposed commission would include representatives of all relevant constituencies and be charged with making specific proposals to address problems in the system and to secure perceived successes. Ideally, the commission would also propose specific legislation to address any problems it identifies.

In Part IV, I preview some of the courses of action open to the commission the Article proposes. The goal of this Part is not to advocate for a particular approach, although several possibilities are ruled out. Rather, Part IV is designed to start the discussion that I hope will continue if a commission is convened.

Part V is a brief conclusion. It acknowledges the political difficulties associated with any change to the current system but ultimately argues that the stakes are too high not to move ahead.

II. VETERANS' BENEFITS: THE CURRENT SYSTEM

In order to assess whether any changes to the system of judicial review of veterans' benefits determinations Congress established in 1988 are warranted, it is essential to understand the system currently in place. This Part is devoted to that effort. It first describes the system of claiming benefits and reviewing denials of such claims.¹⁵ This Part is merely descriptive; it does not critique the system. It then provides statistical information concerning the workload of various actors in the system.¹⁶ This information vividly demonstrates the challenges one faces under any system that might be implemented. Finally, this Part discusses the successes of the 1988 revolution/experiment and identifies its shortcomings.¹⁷

A. The Current System: A Description

As of December 2007, nearly seventy-five million people were potentially eligible to receive some benefit administered through the United States Department of Veterans Affairs (either the "Department" or the "VA").¹⁸ The Department projected to spend more than \$80 billion during fiscal year 2007,

15. See *infra* Part II.A.

16. See *infra* Part II.B.

17. See *infra* Part II.C.

18. See Press Release, Department of Veterans Affairs, Facts About the Department of Veterans Affairs (Dec. 2007), available at <http://www.va.gov/opa/fact/docs/vafacts.pdf>. At times, this Article will also refer to the Department as the "Secretary" where such a reference is appropriate.

nearly \$42 billion of which was for non-health care and cemetery benefits to which veterans are entitled.¹⁹

A veteran wishing to receive a benefit to which she believes she is entitled begins the process by submitting an application for such benefits with one of the VA's more than fifty regional offices (RO) located around the country.²⁰ If the veteran is awarded the benefit she seeks, the process is at an end.²¹ However, there are a number of reasons why the veteran may be dissatisfied with the RO's decision.²²

When the veteran is dissatisfied with the RO's decision, she has the option to pursue an appeal within the Department by filing a "Notice of Disagreement" (NOD) with the RO.²³ The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC) setting forth the bases of the decision being challenged.²⁴ If the veteran wishes to pursue her appeal after receiving the SOC, she must file VA Form 9 with the RO indicating her desire that the appeal be considered by the Board of Veterans' Appeals (Board).²⁵

Congress provided that veterans are entitled to "one review on appeal to the Secretary [of the Department of Veterans Appeals]" when denied benefits.²⁶ In actuality, that appeal is taken to the Board.²⁷ The Board is led by a Chairperson, appointed by the President and confirmed by the Senate, and a Vice Chairperson, designated by the Secretary.²⁸ As of the end of 2007, it was

19. *Id.* The Department of Veterans Affairs "is the second largest of the 15 Cabinet departments." *Id.*

20. See BD. OF VETERANS' APPEALS, HOW DO I APPEAL? 3 (VA pamph. 01-02-02A, Apr. 2002), available at <http://www.va.gov/vbs/bva/010202A.pdf> [hereinafter HOW DO I APPEAL]; VETERANS BENEFITS MANUAL § 12.1.1, at 853 (Barton F. Stichman & Ronald B. Abrams eds., 2007).

21. See VETERANS BENEFITS MANUAL, *supra* note 20, § 12.1.1, at 853.

22. The two most common bases for disagreeing with the RO's decision are that: (1) the RO determined the veteran is not entitled to the benefit she seeks at all; and (2) while the veteran is entitled to the benefit at issue, the claimed disability is "rated" at a level below which the veteran believes is correct. See HOW DO I APPEAL, *supra* note 20, at 1. With respect to ratings decisions, the RO will assign a percentage from 0 to 100 based on its assessment of the veterans' disability. That rating will then be translated into the monthly payment a veteran receives. The rating decision also affects whether the veteran's dependants are eligible for benefits. See FEDERAL BENEFITS FOR VETERANS AND DEPENDANTS, *supra* note 8, at 15–16 (describing rating process).

23. See 38 U.S.C. § 7105(a) (2000); see also HOW DO I APPEAL, *supra* note 20, at 4 (explaining process for veterans).

24. See 38 U.S.C. § 7105(d); see also HOW DO I APPEAL, *supra* note 20, at 5.

25. See 38 U.S.C. § 7105(d)(3); HOW DO I APPEAL, *supra* note 20, at 6. The veteran also has the option to seek review before a Decision Review Officer (DRO) at the RO. This level of review is optional. For a discussion of DRO review, see VETERANS BENEFITS MANUAL, *supra* note 20, § 12.8, at 924–27.

26. 38 U.S.C. § 7104(a).

27. *Id.*

28. See *id.* § 7101(b)(1) (describing appointment of the Chairperson); *id.* § 7101(b)(4) (describing appointment of the Vice Chairperson).

comprised of fifty-six Veterans Law Judges²⁹ and more than 250 staff counsel and other support personnel.³⁰

The Board bases its decision “on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.”³¹ In addition to the material developed at the RO, the Board may also conduct personal hearings with the veteran at which the veteran may add new evidence to the record.³² Before 1988, the Board’s decision in a veteran’s appeal was final and not subject to further review.³³ As described below, a final Board decision adverse to the veteran merely concludes the administrative process.

Currently, if a veteran is dissatisfied with a final decision of the Board, she may elect to appeal that decision to the Veterans Court, which has exclusive jurisdiction to review such matters.³⁴ The Secretary may not appeal an adverse Board decision.³⁵ Congress created the Veterans Court under its Article I powers.³⁶ The Court is currently comprised of seven judges appointed by the President with the advice and consent of the Senate to serve fifteen-year terms.³⁷ The Veterans Court has the “power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”³⁸ The Veterans

29. “Veterans Law Judge” is the term used to refer to those formally known as Board Members. See VETERANS BENEFITS MANUAL, *supra* note 20, § 13.1.2, at 970 (citing 68 Fed. Reg. 6621 (Feb. 10, 2003)). They are appointed to “undefined terms” and are subject to performance reviews conducted by a panel of other members of the Board. *Id.* Board members are appointed by the Secretary with the approval of the President. 38 U.S.C. § 7101A(a)(1).

30. See BD. OF VETERANS’ APPEALS, DEP’T OF VETERANS’ AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2007 2 (2007), available at <http://www.va.gov/vetapp/chairRpt/BVA2007AR.pdf> [hereinafter 2007 BOARD REPORT].

31. See 38 U.S.C. § 7104(a).

32. See HOW DO I APPEAL, *supra* note 20, at 8–10.

33. See WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 5–11 (2002); see also IHOR GAWDIK ET AL., FED. RESEARCH DIV., LIBRARY OF CONGRESS, VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM 66 (1992) (on file with the *Catholic University Law Review*) (“Until the United States Court of Veterans Appeals was established in November 1988, the board’s decisions were final, except for issues concerning insurance contracts, which were subject to action in Federal district courts.”). There were limited exceptions to this preclusion of judicial review focusing on constitutional challenges. See *id.* at 67–68. However, these exceptions did little for the garden variety benefits denial.

34. 38 U.S.C. § 7252(a).

35. *Id.*

36. See *id.* § 7251.

37. See *id.* § 7253(a)–(c). The Court may operate with as few as three judges. See *id.* § 7252(a). There are currently seven active judges on the bench. See Judges of the United States Court of Appeals for Veterans Claims, <http://www.vetapp.uscourts.gov/about/judges> (last visited Jan. 20, 2009). Effective December 31, 2009, Congress has provided for two additional judges for the Court. See Veterans’ Benefits Improvements Act of 2008, Pub. L. No. 110-389 § 601, 122 Stat. 4145, 4176–77 (amending 38 U.S.C. § 7253).

38. 38 U.S.C. § 7252(a).

Court is an appellate body that Congress specifically precluded from making factual determinations.³⁹ The Court has ruled that its jurisdiction is limited to denial (or other dissatisfaction with) individual claims determinations; specifically, the Court is without power to adjudicate class actions or other aggregate litigation concerning more generic veterans benefit issues that may affect groups of veterans.⁴⁰

Any aggrieved party may appeal a final decision of the Veterans Court to the United States Court of Appeals for the Federal Circuit.⁴¹ Review of Federal Circuit decisions is available by writ of certiorari in the Supreme Court of the United States.⁴² Review in these Article III courts is limited by statute. Specifically, in the absence of a constitutional issue, the Federal Circuit (and at least by implication the Supreme Court) may review only legal questions; it is expressly precluded from ruling on a factual determination or on the application of law to the facts in a particular case.⁴³

Figure A summarizes the current procedures for considering challenges to the determination of entitlement to veterans' benefits:

39. *See id.* § 7261(c).

40. *See, e.g.,* *Am. Legion v. Nicholson*, 21 Vet. App. 1, 8 (2007) (en banc) (holding that the court lacked jurisdiction to adjudicate claims brought by an organization as opposed to an individual veteran); *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (rejecting contention that court had the authority to adjudicate class actions).

41. *See* 38 U.S.C. § 7292. The Federal Circuit was created by Congress as an Article III tribunal in 1982. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.). Unlike the other federal circuit courts of appeals, the Federal Circuit's jurisdiction is subject-specific, not geographic. *See* 28 U.S.C. § 1295 (2000) (setting forth Federal Circuit appellate jurisdiction). In the veterans' law context, in addition to hearing appeals from the Veterans Court's decisions, the Federal Circuit also has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" under Title 38. 38 U.S.C. § 7292(c).

42. *See* 28 U.S.C. § 1254 (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals).

43. *See* 38 U.S.C. § 7292(d)(2).

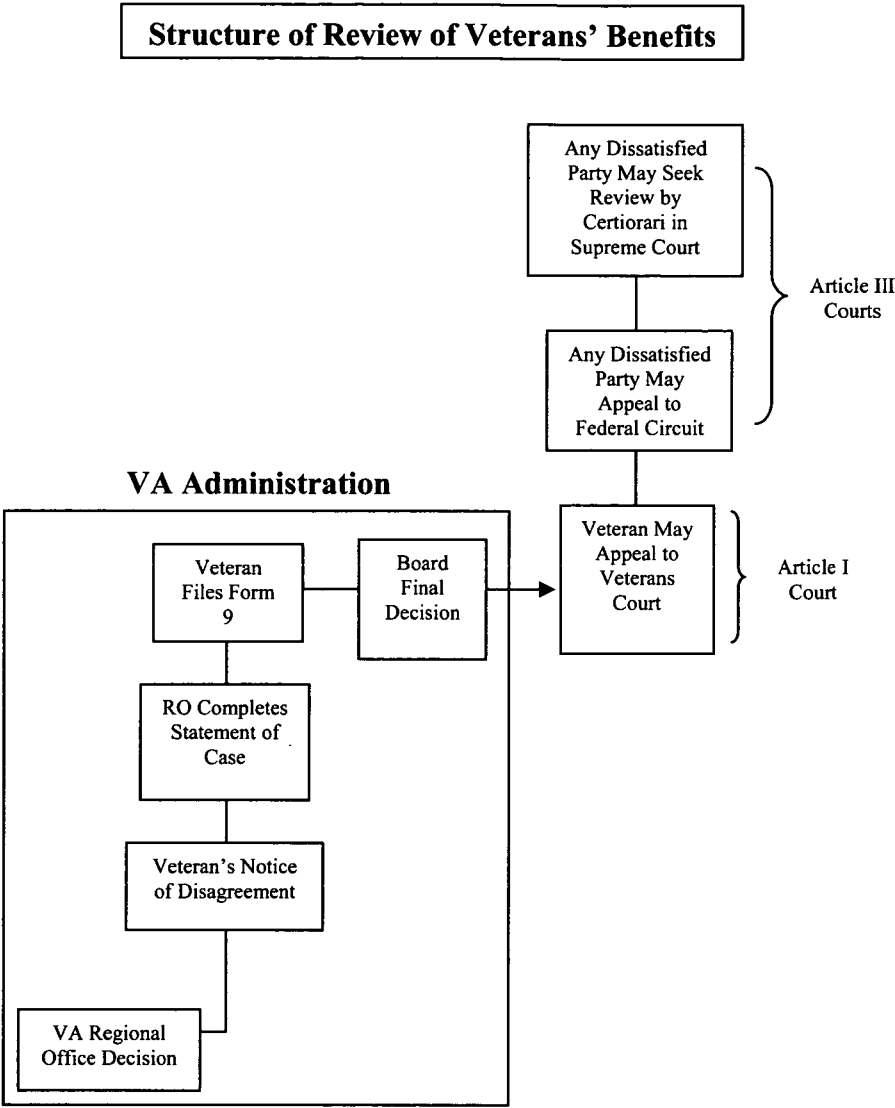


Fig. A

B. Workload in the Current System

As described in this subpart, the workload borne by many of the links in the veterans' benefits chain of review is staggering. Understanding the magnitude of the caseload at the various levels of decision is critical to assessing the success of the current system as well as any changes that might be proposed to it.

In 2007, the VA processed approximately 825,000 claims for benefits from veterans.⁴⁴ The great majority of these claims did not result in an appeal,⁴⁵ but the volume alone indicates in graphic detail the workload of the first-line adjudicators in the system at the RO level. In addition, each year a significant number of veterans are unsatisfied with RO decisions. It is on these claims that this Article focuses. The first relevant statistic in this regard concerns the number of NODs filed at the RO level. In fiscal year 2007, there were 102,752 NODs filed requiring RO personnel to prepare SOC.⁴⁶

As described above, the first level of RO review occurs at the Board. For fiscal year 2007, the Board physically received 39,817 cases in which veterans appealed RO decisions after the veteran had filed a NOD and the RO had issued a SOC.⁴⁷ Recall that there are only fifty-six Veterans Law Judges (plus the Chairperson and Vice Chairperson).⁴⁸ This results in nearly 700 cases per adjudicator, assuming that both the Chairperson and the Vice Chairperson actually adjudicate individual claims. In sum, agency decision-makers at both the RO and the Board are very busy people.⁴⁹

Matters do not change materially as one moves from the administrative process into the court system. In 2007, there were 4644 new cases filed at the Veterans Court.⁵⁰ The Court decided 4877 cases during that period.⁵¹ As a

44. See DEP'T OF VETERANS AFFAIRS, STRATEGIC GOALS (2008), http://www.va.gov/vetdata/docs/Pamphlet_2-1-08.pdf. The Department predicts that claims will exceed 1,000,000 in 2008. Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892 110th Cong. § 2(6) (Apr. 24, 2008).

45. See 2007 BOARD REPORT, *supra* note 30, at 14 (noting that the Board received 39,817 appeals during fiscal year 2007).

46. See *id.* at 18.

47. See *id.* at 14. During this time there were about 5000 additional cases in which a Form 9 indicating an intent to appeal was filed, but the case had not actually arrived at the Board. *Id.*

48. *Id.* at 2.

49. One could make the same point concerning the Board by considering the decisions issued as opposed to appeals received. In fiscal year 2007, the Board issued 40,401 decisions in appeals. *Id.* at 2. Moreover, the statistics for files received and decisions issued in 2007 were not anomalies. In fiscal years 2004–2006, the Board received no fewer than 39,956 cases. *Id.* at 14. It predicts that it will have received 43,000 cases in fiscal year 2008. *Id.* at 15.

50. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT (2007), available at http://www.vetapp.uscourts.gov/documents/Annual_Reports_2007.pdf [hereinafter VETERANS COURT 2007 ANNUAL REPORT].

51. *Id.* This rate of decision is, at least in part, possible because of the Veterans Court's use of its power to decide certain cases through single-judge opinions as opposed to disposition by a panel of judges. See 38 U.S.C. § 7254(b) (2000). I have commented critically elsewhere on the

House of Representatives committee recently recognized, the Court's workload "makes it one of the busiest federal appellate courts."⁵² Not surprisingly, the Court's workload has prompted congressional concern⁵³ as well as led to the recall to service of all but one of the retired judges of the Veterans Court.⁵⁴ As with other adjudicators in the system, the Veterans Court is laboring to keep pace with a massive workload.⁵⁵

The next level of decision-maker is the Federal Circuit. In 2007, 21% of the appeals filed with the Federal Circuit concerned appeals from the Veterans Court.⁵⁶ In other words, approximately 325 of the Federal Circuit's 1545 filed cases in fiscal year 2007 originated in the Veterans Court.⁵⁷ And what of the future? In his State of the Court address, Chief Judge Paul Michel recently suggested that the Federal Circuit anticipated "floods of veterans' cases."⁵⁸

use of this mode of decision-making. See Allen, *Significant Developments*, *supra* note 11, at 515–21; see also Sarah M. Haley, Comment, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 564–71 (2004) (critically discussing the use of the single-judge procedure). For present purposes, however, the use of single-judge adjudication is some evidence of the steps that the Court has taken to address its massive caseload.

52. See H.R. REP. NO. 110-789, at 18 (2008). For a detailed statistical summary of the workload of all the circuit courts of appeals, see ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 86 tbl. B-1 (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf> [hereinafter 2007 JUDICIAL BUSINESS].

53. For example, a House of Representatives Veterans Affairs' Committee report recently commented that the committee was "concerned with [the Court's] growing backlog of appeals." H.R. REP. NO. 110-789, at 18.

54. Congress provided that the Chief Judge of the Veterans Court may recall retired judges of the Court if their service is required. See 38 U.S.C. § 7257. Chief Judge William Greene has exercised his authority under this statute numerous times within the past two years. See, e.g., Miscellaneous Orders 2007, United States Court of Appeals for Veterans Claims (2007) [hereinafter Miscellaneous Orders 2007] (Nos. 23-07, 22-07, 16-07, 03-07, 02-07, 01-07), available at http://www.vetapp.gov/miscellaneous_orders/MiscellaneousOrders2007.cfm.

55. As with the Board, the figures for the Veterans Court during 2007 are not aberrational. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50 (reporting new filings with a low of 2150 in 2002 to a high of 3729 in 2006).

56. See United States Court of Appeals for the Federal Circuit, Appeals Filed, by Category, FY 2007, <http://www.cafc.uscourts.gov/pdf/ChartFilings07.pdf>.

57. Compare United States Court of Appeals for the Federal Circuit, Historical Caseload: Appeals Filed FY 1983–FY 2007, available at <http://www.cafc.uscourts.gov/pdf/HIST%20CASELOAD%2083-07%20CHART.pdf> (showing all cases filed in Federal Circuit), with United States Court of Appeals for the Federal Circuit, Appeals Filed in Major Origins: FY 1983 – FY 2007, <http://www.cafc.uscourts.gov/pdf/10yr%20Hist%20Caseld%20by%20Origin.pdf> (breaking down filed appeals by category of body from which decision was rendered).

58. See Chief Judge Paul R. Michel, Fed. Cir., Address to the Federal Circuit Judicial Conference on the State of the Court 4 (May 15, 2008), available at <http://www.cafc.uscourts.gov/pdf/State%20of%20the%20Court%205-08.pdf>. These comments track those Chief Judge Michel made earlier expressing concern about the volume of cases in the Federal Circuit regarding veterans' benefits matters. See *The U.S. Court of Appeals for the Federal Circuit*—

Thus, the Federal Circuit is not immune to the demands the veterans' benefits system imposes.⁵⁹

C. *An Evaluation of the Current System*

The previous two subparts have described the current system under which veterans' benefits are adjudicated and judicially reviewed and the workloads of the various entities engaged in that enterprise. This subpart evaluates the successes and shortcomings of that system over the past two decades.

1. *Successes of Judicial Review*

The establishment of judicial review of veterans' benefits determinations in 1988 led to several important improvements in the system by which we honor America's service members. This part discusses the four most significant ways in which the creation of judicial review in this area has succeeded.

a. *Development of the Law*

A primary focus, and central success, of the Veterans Court has been the doctrinal development of the law of veterans' benefits. When the Court began operations twenty years ago, there was almost no law concerning veterans' benefits determinations outside of the implementation of congressional statutes by the VA.⁶⁰ Today, there are twenty-two volumes of West's *Veterans Appeals Reporter* containing the precedential opinions of the Court.⁶¹

A review of those volumes shows an institution that has worked diligently to bring order, predictability and transparency to the system. Do not get me wrong—there is still doctrinal confusion in certain areas.⁶² Moreover, as I

Could Rising Appeals Swamp the Court?, THE THIRD BRANCH (Wash., D.C.), Oct. 2007, at 7 (discussing concerns of Chief Judge Michel).

59. Matters are different, of course, at the Supreme Court. That body has to date decided only two cases originating in the Veterans Court. See *Scarborough v. Principi*, 541 U.S. 401, 404–06 (2004) (holding that a timely filed application for attorneys' fees under the Equal Access to Justice Act may be amended after the thirty-day period the statute provides to file an application); *Brown v. Gardner*, 513 U.S. 115, 116–17 (1994) (holding that the Department exceeded its authority when it promulgated a regulation requiring a person injured in a VA hospital to prove negligence under the existing statute). The Supreme Court agreed to hear an additional case during its October 2008 Term. See *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), *cert. granted sub nom. Peake v. Sanders*, 128 S. Ct. 2935 (June 16, 2008) (No. 07-1209). The Supreme Court will review the Federal Circuit's opinion and decide whether the Department's failure to provide a veteran certain notices required under law should be presumed to be prejudicial to the veteran.

60. See Allen, *Significant Developments*, *supra* note 11, at 486–87.

61. See VETERANS APPEALS REPORTER Vol. 1–22 (1992–2008). There is also a body of law developed by the Federal Circuit in its role in the system.

62. The purpose of this Article is not to discuss the substance of the law of veterans' benefits. I have done this elsewhere, at least for the years 2004–2008. See Allen, *Significant Developments*, *supra* note 11, at 496–514; Michael P. Allen, *The United States Court of Appeals for Veterans Claims: Past, Present, and Future* 2–24 (Apr. 2008) (unpublished manuscript).

have argued elsewhere, the Court has not always done as much as one would hope to be a systematic lawmaker in the area as opposed to a mere corrector of Board decisions in individual cases.⁶³ Nevertheless, the Court has been quite successful in creating a coherent body of law concerning veterans' benefits.

In addition, the Veterans Court has contributed to a growth in uniformity and predictability in the law concerning veterans' benefits. The Court's precedential opinions, subject to Federal Circuit review, provide broad rules governing the claims adjudication process throughout the agency and across the country. All actors in the system are in a position to know the law when it is settled and to make reasonable predictive judgments about outcomes in individual cases. Such uniformity and predictability could certainly be said to be staples of the rule of law itself. In that respect, the development of uniformity and predictability over the past twenty years is an important success of judicial review under the VJRA.

b. Development of the Court as an Institution

It is easy to forget the challenges that faced the Veterans Court at its inception. The judges of the Court were confronted with a situation almost unheard of in American law.⁶⁴ In addition to writing on a clean slate in terms of the content of veterans' benefits law, the judges were also required to build an institution from the ground up.⁶⁵ Where was the Court physically to be located? How was it to pay its bills? How did it fit into other governmental structures? Answering all these questions was as important to the success of the enterprise as was producing solid judicial opinions.⁶⁶

Once it was established physically, the Court then needed to focus on its substantive work. One of the striking aspects of the history of the Veterans Court is the conscious way in which the judges of the Court, over time,

prepared in conjunction with the Tenth Judicial Conference of the United States Court of Appeals for Veterans Claims, on file with the *Catholic University Law Review*) [hereinafter Allen, Past, Present, and Future].

63. See Allen, *Significant Developments*, *supra* note 11, at 514–22 (describing dual roles of Veterans Court as correcting Board errors and acting as a “law-giver” by issuing precedential opinions).

64. See Nebeker, *supra* note 13, at 6 & n.3 (observing that, apart from the Foreign Intelligence Surveillance Court, “[v]ery few other federal courts . . . were created without any predecessor tribunal”).

65. See *id.* at 6–7.

66. The Veterans Court's first Chief Judge recently described some of these practical challenges when he spoke at the Court's Tenth Judicial Conference. See Frank Nebeker, Chief Judge (Ret.), United States Court of Appeals for Veterans Claims, Remarks at the Tenth Judicial Conference of the United States Court of Appeals for Veterans Claims 8–16 (Apr. 14, 2008) (transcript on file with the *Catholic University Law Review*) [hereinafter Nebeker Remarks].

developed the institution as a *court*. It is one thing for Congress to say that it is creating a court of law;⁶⁷ it is quite another for that institution to become one.

First, the Court issued decisions early on that aligned it in many important respects with more traditional federal courts. For example, in *Mokal v. Derwinski*,⁶⁸ the Court adopted as a matter of policy the case or controversy requirements binding Article III courts under the Constitution.⁶⁹ The Court was not obligated to take this approach.⁷⁰ Moreover, even if one believes that the Court should not follow these requirements today, *Mokal* was correctly decided *at the time*. The Court recognized in 1990 that it needed to establish itself as a judicial body⁷¹ and not merely an adjunct of the Department. Adopting the case or controversy requirements went a long way in this regard.

One can also see this effort to tie the Veterans Court to other, more traditional, judicial bodies in its firm commitment to time limits associated with filings at the Court. As I have explained elsewhere, the Veterans Court has been far stricter on veterans than has the Federal Circuit in this regard.⁷² One reason for this difference between the courts might very well be the Veterans Court's need to be more cognizant of establishing itself as an institution.

Second, the Veterans Court has fought to establish and assert its independence from the Department. I will not dwell on this topic here. I discuss below two recent examples of the Veterans Court's efforts to ensure that its decisions are binding even when parties such as the Secretary do not agree with them.⁷³ These actions have been essential to making judicial review in this area as successful as it has been.

Third, the Veterans Court has developed procedures that seek to preserve its role as an appellate tribunal while coping with a staggering caseload.⁷⁴ Most importantly in this respect, perhaps, is the Court's use of its authority to decide cases by single-judge opinions.⁷⁵ In an important early opinion, the Court set out a test now contained in the Court's Internal Operating Procedures for determining when a case was appropriate for single-judge disposition.⁷⁶ I have

67. See 38 U.S.C. § 7251 (2000) ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.").

68. 1 Vet. App. 12 (1990).

69. *Id.* at 14–15.

70. *Id.* at 14.

71. See *id.* at 15.

72. See Allen, *Significant Developments*, *supra* note 11, at 497–502.

73. See *infra* Part II.C.2.

74. The caseload concern is discussed above. See *supra* Part II.B.

75. See 38 U.S.C. § 7254(b) (2000).

76. See Frankel v. Derwinski, 1 Vet. App. 23, 25–26 (1990); UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, INTERNAL OPERATING PROCEDURES II(b), at 1–2 (2004), available at <http://www.vetapp.gov/documents/IOP2004.pdf>.

not been a fan of the single-judge procedure—at least not with the frequency with which the Court has used it.⁷⁷ Nevertheless, it is an innovative tool that is emblematic of the Court's efforts to develop itself as an institution.

c. The Perception of Fairness and Process for Veterans

A common refrain in the congressional hearings that led up to the enactment of the VJRA was that veterans were being denied basic due process protections afforded to most other Americans.⁷⁸ The path to the courts was open to those claiming the wrongful denial of other government benefits, but not to the men and women who served in the armed forces.⁷⁹

Of course, there were also dissenting voices in the hearings.⁸⁰ Their claim was largely based on the historic understanding of the veterans' benefits system.⁸¹ The VA at the time (as well as today) described its system for awarding benefits and administratively reviewing these decisions as non-adversarial.⁸² The argument continued that no outside review was required because the system was inherently fair—indeed, more than fair—to the veteran.⁸³

Yet such claims of inherent fairness did not rest easy alongside the long tradition of due process in this country. Congress recognized this reality and enacted the VJRA to align veterans with most other people in the United States in terms of the availability of a neutral (and, perhaps most importantly, a

77. See Allen, *Significant Developments*, *supra* note 11, at 515–21.

78. See, e.g., S. 11, *The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act*, and S. 2292, *Veterans' Judicial Review Act: Hearing Before the S. Comm. on Veterans' Affairs*, 100th Cong. 1 (1988) [hereinafter *Senate VJRA Hearing*] (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affairs) ("I want to be clear that my motivation in continuing to push for judicial review is the belief that it is a fundamental right which should be afforded to all veterans"); *id.* at 17 (statement of Sen. John Kerry) (describing the importance of judicial review in America and stating "[v]eterans—veterans—are the only class of people in the United States of America who don't have the right to get that kind of independent review").

79. See *id.* at 17 (statement of Sen. Kerry).

80. A prime example of this point can be seen in the questioning of the minority chief counsel to the Senate Veterans' Affairs Committee in connection with the VJRA. He stated "we hear the clichés and the slogans—some of them are very, very important—about due process and growing accustomed to revere judicial review, that veterans should be treated no differently than criminals, Social Security recipients, illegal aliens; and that is certainly true." *Id.* at 26 (statement of Anthony Principi, Minority Chief Counsel, S. Comm. on Veterans' Affairs). However, he then went on to argue against changing the system absent "some underlying justification" for moving away from the VA's current practices. *Id.*

81. See *id.*

82. See 38 C.F.R. § 3.103(a) (1988) ("Proceedings before the Veterans Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government."); see also 38 C.F.R. § 3.103(a) (2007).

83. See *Senate VJRA Hearing*, *supra* note 78, at 26 (statement of Mr. Principi).

perceived-neutral) and unbiased body to review benefits determinations.⁸⁴ To be sure, there are still complaints about the process of adjudication and its inherent fairness, particularly within the Department.⁸⁵ Nevertheless, the provision of adjudicators outside the VA has added a certain legitimacy to the process that was lacking. This is a gain under the VJRA that should not be discounted.

d. Improving the Quality of Administrative Decisions

A final success of the Veterans Court and judicial review in general over the past twenty years has been the increase in the quality of administrative decisions within the VA, particularly at the Board level. A concern with poorly explained and reasoned decisions was one of the issues mentioned in congressional hearings concerning the creation of the Veterans Court in 1988.⁸⁶ That issue was clearly on the minds of the early judges of the Court as a major goal of judicial review. Indeed, in private discussions with the author, many of the retired judges of the Court commented that one of the Veterans Court's principal successes has been improved decision-making at the VA.⁸⁷ Such improved decision-making has also been noted in Congress.⁸⁸

There are, of course, different ways to judge whether decision-making has "improved." The most obvious, perhaps, is to judge whether the ultimate outcome of the decisions rendered at the Agency is correct more often than not before judicial review. I suspect that the Veterans Court has had a positive effect measured in this way, but it is difficult to tell. There was no judicial review before 1988 so we have little with which to compare reversal rates today. The affirmance rate, at least over the past ten years, has fluctuated without much in the way of explanation.⁸⁹

Another way in which to assess the quality of opinions at the Agency level turns on their content, not simply their result. It is in this respect that I believe

84. See *id.* at 49 (statement of Frank E.G. Weil, Nat'l Sec'y, Am. Veterans Comm.); *id.* at 50 (statement of Dr. Dorothy Legarreta, President, Nat'l Ass'n of Radiation Survivors); *id.* at 52 (statement of Philip Cushman, President, Nat'l Due Process, Inc.).

85. See, e.g., *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1055 (N.D. Cal. 2008) (rejecting claims by a veterans group that the VA adjudication process denied veterans due process and was otherwise unlawful). For further discussion of this case, see *infra* notes 107–13 and accompanying text.

86. See, e.g., *Senate VJRA Hearing*, *supra* note 78, at 8 (statement of Sen. Alan Simpson) (lamenting that the VA did not "document[] . . . factors and considerations which lead to denial[s of claims]").

87. The author retains copies of notes of conversations with all but one of the retired judges of the Veterans Court. These conversations were "off-the-record," in that the author agreed not to identify any comments made by particular judges.

88. See H.R. REP. NO. 110-789, at 18–19 (2008) (recognizing improved administrative decision-making but expressing concern about the effect of the improvement on the overall timeliness of decisions).

89. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50.

the retired judges of the Court see the greatest improvement. I agree. Moreover, that improvement is not merely accidental. Instead, it is a direct result of the Veterans Court's rigorous enforcement of the statutory requirement that the Board provide adequate reasons and bases for its decisions.⁹⁰ Are Board decisions perfect today? Of course not, but they are better both in terms of reasoning and, perhaps equally importantly, in the information they provide to the veteran.⁹¹ This increase in transparency and perception (as well as reality) of process is an accomplishment that should not be overlooked or undervalued.⁹²

2. Shortcomings of Judicial Review

Despite the successes outlined above, the past twenty years have also demonstrated that there are weaknesses in the current system. This subpart discusses six of the most significant weaknesses.

a. Delay for Veterans Seeking Benefits

Perhaps the most significant shortcoming of the current system of veterans' benefits determinations and their judicial review is the delay that veterans face. Delay is a facet of nearly every part of the process. At the RO stage, the average time for the processing of a filed claim in 2007 was 183 days.⁹³ At the Board in 2007, the average time between the date an appeal was physically received and the date when the Board mailed a decision to the veteran was 136 days.⁹⁴ Finally, at the Veterans Court in 2007, the median time from the filing of an appeal to disposition was 416 days.⁹⁵ When these statistics are aggregated the result is truly stunning. For claims appealed to the Veterans Court, average time to disposition is between five and seven years.⁹⁶

90. See 38 U.S.C. § 7104(d)(1) (2000).

91. See, e.g., *Hupp v. Nicholson*, 21 Vet. App. 342, 355 (2007) (explaining that the "reasons or bases" requirement ensures that the decision is "adequate to enable the appellant to understand the precise basis for the Board's decision as well as to facilitate review in [the Veterans Court]"); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56–57 (1990) (discussing reasons and bases requirement).

92. The Board continues to strive to improve its decision-making. For example, in his most recent report, the Board Chairman discussed his initiative to continue improvement in the quality of Board decisions. See 2007 BOARD REPORT, *supra* note 30, at 5.

93. See Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892, 110th Cong. § 2(8) (2008); see also H.R. REP. NO. 110-789, at 2 (2008) (analyzing VA statistics and noting that "[a]s VA's inventory of claims increases, its realistic ability to process these claims in a timely fashion under its current system has been called into serious question").

94. See 2007 BOARD REPORT, *supra* note 30, at 2. The significant delays in resolution of appeals within the Department have also been judicially recognized in a lawsuit filed by certain groups representing veterans. See *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1073–74 (N.D. Cal. 2008). I discuss this case later in this subpart. As I explain, the district court ultimately ruled against the veterans groups in the matter. *Id.* at 1091–92.

95. H.R. REP. NO. 110-789, at 18. This was a significant increase from the 2006 median time from filing to disposition of 351 days. *Id.*

96. *Id.*

In addition to the sheer volume of claims adjudicated at each level of the system,⁹⁷ a significant cause of the delays veterans experience is the use of remands by both the Board and the Veterans Court. In 2007, the Board remanded nearly 36% of all cases to the RO or another VA body.⁹⁸ When the Board remands a case, it “typically adds more than a year to the appellate process.”⁹⁹ Moreover, of these remanded matters, approximately 75% eventually return to the Board for further proceedings.¹⁰⁰ The Board has indicated that one of its primary goals for the future is to “[e]liminat[e] avoidable remands.”¹⁰¹

Remands have also plagued matters at the Veterans Court. Disaggregating the statistics the Court provides to determine the precise number of remands is not an easy task. According to a report prepared by the House Veterans’ Affairs Committee in 2007 the Veterans Court issued “3,211 merit decisions, the majority of which, more than 2000, were remanded (some in part only) and 1,098 were affirmed.”¹⁰² Even if the Committee’s statistics are off by 50%,¹⁰³ remands at the Veterans Court would still be a significant delay-causing problem in the current system.¹⁰⁴

b. Prejudice to Veterans from the Transition from the “Non-Adversarial” VA Process to the Adversarial Proceedings at the Veterans Court

The agency adjudication system is largely premised on its non-adversarial and paternalistic nature.¹⁰⁵ There is real debate on whether that state of affairs remains the case, if it ever was an accurate description.¹⁰⁶ Moreover, there has

97. See *supra* Part II.B (providing statistics concerning number of claims adjudicated at RO, Board, and Veterans Court).

98. 2007 BOARD REPORT, *supra* note 30, at 3.

99. *Id.*

100. *Id.*

101. *Id.*

102. H.R. REP. NO. 110-789, at 18 (2008). It appears that the House Committee used the Veterans Court’s 2007 Annual Report as the basis for this statement. That report confirms that the Court issued 3211 merits decision in 2007. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50. The report also indicates that 442 of these decisions were “[a]ffirmed or dismissed in part, reversed/vacated & remanded in part,” 524 were “[r]everse[d]/vacated & remanded,” and 1079 were “[r]emanded.” *Id.* It appears that the committee’s reference to more than 2000 decisions being remanded was reached by adding these three numbers together.

103. In other words, if one were to consider just the 1079 decisions in which the only action of the Court was remand. See *id.*

104. I have written elsewhere about the problems inherent in the Veterans Court’s use of remands. See Allen, *Significant Developments*, *supra* note 11, at 528–29.

105. See *supra* note 82 and accompanying text.

106. A full discussion of the reality of the nature of VA adjudication is beyond the scope of this Article. However, an excellent illustration of the confusion about the true state of affairs in this regard can be found in opinions rendered by a district court in connection with litigation challenging the nature of the VA process, which I discuss later in this subpart. See *infra* notes

been clear movement toward a more traditional adversarial model in recent years. For example, in 2006 Congress removed a preexisting barrier that effectively precluded a claimant from hiring attorneys before a final Board decision.¹⁰⁷ The likely increased presence of lawyers in the agency process will almost certainly further move the system in an adversarial direction.

Whatever the reality is, there has been, and remains, a tension between the agency-level process and the unquestionably traditional adversarial process at the Veterans Court and beyond.¹⁰⁸ In a sense, veterans transitioning from one system to another have the potential to be caught unaware of new rules and other formalities. A prime example of this difficulty concerns the strict application of the time within which a veteran must file her notice of appeal of an adverse Board decision. A veteran dissatisfied with a final Board decision must file a notice of appeal with the Veterans Court within 120 days after the Board mails notice of the decision at issue to the veteran.¹⁰⁹ Both the Federal Circuit and the Veterans Court have wrestled with how strictly to construe this limitation. As a general matter, the Federal Circuit has been more willing to “equitably toll” the 120-day period than has the Veterans Court.¹¹⁰ For present

107–11 and accompanying text. For present purposes, it is instructive to note that in denying in major part a motion to dismiss, the district court wrote:

If the VA claims adjudication system were truly non-adversarial, then Plaintiffs’ due process claim would be on shaky ground. And although the system was clearly intended to be non-adversarial, Plaintiffs have alleged that this is no longer the case. The Federal Circuit, which has exclusive appellate jurisdiction under the VJRA, has recognized this de-facto shift towards an adversarial system. [The district court then cited *Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc).]

Although it is clearly not in this Court’s power to rewrite a statute that provides for a non-adversarial adjudication process at the regional office level, it is within the Court’s power to insist that veterans be granted a level of due process that is commensurate with the adjudication procedures with which they are confronted.

Veterans for Common Sense v. Nicholson, No. C-07-3758 SC, 2008 WL 114919, at *15–16 (N.D. Cal. Jan 10, 2008). However, a more recent decision by the Northern District of California added to the uncertainty by suggesting that the nature of the VA adjudicatory process was not necessarily so clear. See *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1087 (N.D. Cal. 2008) (noting that, four years after *Bailey*—the case the district court cited when denying in part the motion to dismiss—the Federal Circuit suggested that “the process at the RO level remains non-adversarial”). Suffice it to say, the true state of affairs remains murky at best.

107. See *Veterans Benefits, Health Care, and Information Technology Act of 2006*, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3407 (2006) (codified at 38 U.S.C. § 5904(c)(1)).

108. I have written about this tension elsewhere. See Allen, *Significant Developments*, *supra* note 11, at 526–28.

109. See 38 U.S.C. § 7266 (2000).

110. I have discussed this issue in depth in prior writings. See Allen, *Significant Developments*, *supra* note 11, at 497–502; Allen, Past, Present, and Future, *supra* note 62, at 4–9. The Supreme Court has recently called into question the doctrine of equitable tolling in general when there is a statutorily mandated time within which to file an appeal. See *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (holding that “the timely filing of a notice of appeal in a civil case is a jurisdictional requirement” and that the requirement may not be tolled or otherwise avoided). A consideration of the effect of *Bowles* in the context of the Veterans Court is beyond the scope of

purposes, the importance of this issue is an example of the pitfalls that a veteran faces when moving from a system designed, at least in part, to be non-adversarial, to one that follows more traditional practices.¹¹¹

c. The Relationship Between the Veterans Court and the Federal Circuit

The relationship between the Veterans Court and the Federal Circuit is unique for several reasons. First, there is no other situation in the federal court system in which the decisions of one appellate body are subject to review as of right in another appellate body, other than the Supreme Court. This feature of the system has several potentially negative effects. It undermines, in at least some respect, the ability of the Veterans Court to serve its role as the expert lawmaker in this area of law. In addition, it engenders even further delay in a system beset by it.¹¹²

A second unique feature of the system is the limited nature of the Federal Circuit's review of Veterans Court decisions. Except in cases raising constitutional issues, the Federal Circuit is precluded from reviewing issues of fact or the application of law to fact.¹¹³ In many cases, this limitation on appellate review requires that the Federal Circuit wrestle with jurisdictional questions instead of, or before, reaching the merits.¹¹⁴

Each of these unique features of the formal relationship between the Federal Circuit and the Veterans Court is a cause of some dysfunction in the current system. However, there is also a less formal issue between these two bodies that is the cause of some concern. As I have explored in a prior article, these two courts at times treat one another with a lack of respect that is surprising.¹¹⁵ For example, the Veterans Court has taken the position that the Federal Circuit does not understand the very nature of the Veterans Court's role in the process.¹¹⁶ For its part, the Federal Circuit has treated the Veterans Court as though it misunderstands the role of the Veterans Court in the system as a

this Article. For a discussion of the issue, see Allen, Past, Present, and Future, *supra* note 62, at 7–9.

111. This difficulty is enhanced by the high rate of pro se appeals at the time of filing in the Veterans Court. For example, in 2007, 53% of veterans were unrepresented at the time of filing. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50.

112. Congress has noted this feature of dual appellate review. See H.R. REP. NO. 110-789, at 20 (2008) (noting that the Veterans Court's retired judges had testified that the additional level of review at the Federal Circuit had added to delay).

113. See 38 U.S.C. § 7296(d)(2).

114. See Allen, *Significant Developments*, *supra* note 11, at 541–42 app. B (collecting Federal Circuit's jurisdictional decisions in a two-year period).

115. See *id.* at 523–26.

116. See, e.g., *Bobbitt v. Principi*, 17 Vet. App. 547, 553 (2004) (“[T]he Federal Circuit apparently presumes that this Court is part of VA . . .”). I provide additional examples of the Veterans Court's attitude toward the Federal Circuit in my earlier article. See Allen, *Significant Developments*, *supra* note 11, at 523 n.233.

whole.¹¹⁷ The bottom line is that the uneasy, and at times, awkward, relationship between these two courts has become a serious negative aspect of the current system of judicial review of veterans' benefits determinations.

d. The Relationship Between the Veterans Court and the Department

A driving force behind the enactment of the VJRA was the desire to have a body independent of the Department review veterans' benefits determinations.¹¹⁸ The Veterans Court was that body. However, the Department has not always treated the Court with the respect it is due. At some level, tension between the Department and the Veterans Court was to be expected. After all, for nearly two centuries the Department and its predecessors had been the final word in the area.¹¹⁹ But one would have expected this tension to resolve itself after twenty years. It has not.

The Department continues to treat the Veterans Court in a manner inconsistent with an independent adjudicative body. A prime example is the Secretary's actions in the wake of the Veterans Court's decision in *Haas v. Nicholson*.¹²⁰ In *Haas*, the Veterans Court held that the presumption of service connection for certain diseases related to exposure to Agent Orange for

117. As I describe in my earlier article, the back-and-forth between the Federal Circuit and the Veterans Court concerning the doctrine of equitable tolling provides an example of this tension. See Allen, *Significant Developments*, *supra* note 11, at 497–502. I discussed equitable tolling above. See *supra* text accompanying notes 108–11.

118. See *supra* Part II.A.

119. See *supra* Part II.A (discussing effective absence of judicial review before enactment of the VJRA in 1988).

120. 20 Vet. App. 257 (2006). The Federal Circuit eventually reversed and remanded the Veterans Court's decision. *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008), *cert. denied*, 77 U.S.L.W. 3267 (U.S. Jan 21, 2009) (No. 08-525). This reversal on substantive grounds does not affect the impropriety of the Secretary's actions with respect to the Veterans Court's initial decision as discussed in the text.

veterans having “service in the Republic of Vietnam”¹²¹ included service on ships near the shore of that nation.¹²²

For present purposes, *Haas* is significant not for its substantive holding, but rather for the Secretary’s reaction to it. In addition to appealing the Veterans Court’s decision to the Federal Circuit, the Secretary also ordered the Board Chairman to stay all cases pending before the Board that were affected by *Haas*.¹²³ The Board Chairman followed the Secretary’s direction.¹²⁴ Neither the Secretary nor the Board Chairman sought court approval—either at the Veterans Court or the Federal Circuit—before staying the *Haas*-related cases.¹²⁵

Nicholas Ribaldo, a veteran whose case was pending before the Board and who would arguably have been entitled to *Haas*’s interpretation of the Agent Orange presumption, sought a writ of mandamus from the Veterans Court ordering the Board Chairman to rescind the memorandum and adjudicate his claim according to established procedures.¹²⁶ The Veterans Court, in an en banc opinion, granted the writ, concluding:

Because the head of an executive agency does not have the authority to nullify the legal effect of a judicial decision, and because the Secretary did just that by ordering the issuance of Board Chairman’s Memorandum 01-06-24 imposing a stay of indefinite duration without first seeking judicial imprimatur, the petition [for a writ of mandamus] will be granted.¹²⁷

121. *Haas*, 20 Vet. App. at 259 (citing 38 U.S.C. § 1116(f) (Supp. V 2005)); see also 38 C.F.R. § 3.307(a)(6)(iii) (2003) (implementing 38 U.S.C. § 1116). In order to be entitled to receive disability benefits, a veteran generally must establish that she (in addition to being honorably discharged) has a current disability, that the disability is connected to service in the armed forces, and that it is not the result of the abuse of drugs or alcohol. See 38 U.S.C. §§ 1110, 1131 (2000); see also VETERANS BENEFITS MANUAL, *supra* note 20, at 45–251 (describing in-depth the laws and regulations for service-connected disabilities). There are a number of ways in which to establish that a veteran’s disability is service-connected. One method is through the use of statutory presumptions. The issue in *Haas* concerned such a presumption. If a veteran served in Vietnam and has a “disability . . . resulting from exposure to a herbicide agent,” that veteran is presumed to have been exposed to Agent Orange. 38 U.S.C. § 1116(f) (Supp. V 2005). The statute lists diseases that, based on scientific evidence, are deemed to be linked to such exposure. *Id.* § 1116(a)(2) (2000). Thus, if a veteran established she was in Vietnam during the appropriate time and that she currently has one of the listed diseases, there arises a presumption of service-connection for that disability. *Id.* § 1116(a)(3).

122. *Haas*, 20 Vet. App. at 279. The Federal Circuit eventually reversed the Veterans Court on this point, holding that the statute and relevant regulations required a veteran to have been on land to be entitled to the presumption of exposure. *Haas*, 525 F.3d at 1197.

123. See Memorandum No. 01-06-24 from James P. Terry, Chairman, Bd. of Veterans’ Appeals (Sept. 21, 2006) (on file with the *Catholic University Law Review*).

124. See *id.*

125. See *id.* (indicating that the memorandum was issued at the Secretary’s request).

126. See *Ribaldo v. Nicholson*, 20 Vet. App. 552, 553 (2007) (en banc).

127. *Id.*

Ribaudo represents an impediment to achieving Congress's vision reflected in the VJRA because of the resistance of the executive branch to the authority of the Veterans Court. It was frankly shocking that the Secretary could think that it was consistent with the rule of law to essentially ignore the decision of a court because he disagreed with an outcome.¹²⁸ It turned out to be the case that the Veterans Court got it wrong in *Haas*, at least according to the Federal Circuit.¹²⁹ It may also have been the case that the impact of such an erroneous decision would have been great. But both of these points are irrelevant. In a system in which there is obedience to the rule of law, one simply cannot unilaterally ignore decisions of courts. If the Secretary had been convinced that the decision—which he had a right to appeal—was not only incorrect, but would have a significant detrimental effect on the Department, he could have sought a stay from the Veterans Court.¹³⁰ What he could not do in our system, however, as the Veterans Court made clear, is act unilaterally.¹³¹

The Secretary's action in *Ribaudo* is even more significant because it is not an isolated incident. In 2005, the Secretary disagreed with another decision of the Veterans Court and engaged in the same type of unilateral action, staying adjudication of certain cases pending before the Board.¹³² When that action was challenged, the Veterans Court made quite clear that the Secretary simply could not ignore orders of the Veterans Court even if he disagreed with such decisions vehemently.¹³³

The Secretary's actions defying the Veterans Court go to the very heart of the current system for judicially reviewing veterans' benefits determinations. If the Department will not recognize the Court's authority—indeed, in some sense its legitimacy—after two decades, the system as it currently stands is likely irretrievably broken. At a minimum, these actions reflect a significant flaw in the process.

128. I wish to make unmistakably clear that this conclusion is mine and not that of the Veterans Court. The Court in *Ribaudo* stated that the Secretary's legal arguments in the appeal at least "were made in good faith." See *id.* at 554 n.2.

129. See *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008), *cert. denied*, 77 U.S.L.W. 3267 (U.S. Jan 21, 2009) (No. 08-525).

130. See *Ribaudo*, 20 Vet. App. at 560.

131. *Id.* at 558.

132. See Memorandum No. 01-05-08 from Ron Garvin, Acting Chairman, Bd. of Veterans' Appeals (Apr. 28, 2005) (on file with the *Catholic University Law Review*) (ordering the stay of adjudication concerning certain matters regarding claims for tinnitus).

133. See *Ramsey v. Nicholson*, 20 Vet. App. 16, 37–38 (2006). I have also discussed the importance of *Ramsey* elsewhere. See Allen, *Significant Developments*, *supra* note 11, at 512–14. In *Ribaudo*, the Secretary argued that *Ramsey*'s clear rejection of the Secretary's unilateral action was mere dicta. The Veterans Court did not accept this argument. See *Ribaudo*, 20 Vet. App. at 554 n.2.

e. The Relationship Between the Veterans Court and Congress

There is also a certain tension between Congress and the Veterans Court under the current system. As described above, the Veterans Court is a body independent of the Department.¹³⁴ It is also self-evidently (as well as expressly defined as) a court of law.¹³⁵ Yet, Congress at times treats the Veterans Court in a manner more akin to an administrative agency or other, non-judicial body. For example, some of this tension is no doubt attributable to the fact that legislative jurisdiction over the Veterans Court is not with the judiciary committees of either the House of Representatives or the Senate. Instead, the veterans affairs committees of each chamber have responsibility for the Court.¹³⁶ Although this division of responsibility makes sense in terms of the subject matter with which the Court deals, it can lead to congressional actions that are at odds with the manner in which the legislative branch customarily deals with judicial bodies.

A prime example can be seen in a bill the House of Representatives passed in the summer of 2008. This bill purported to instruct the Court on the arguments it would be required to address when adjudicating an appeal.¹³⁷ Specifically, the bill provided that “The Court shall have power to affirm, modify, reverse, remand, or vacate and remand a decision of the Board *after deciding all relevant assignments of error raised by an appellant for each particular claim for benefits.*”¹³⁸ This portion of the bill was not a part of the statute signed into law.¹³⁹ Nevertheless, it is significant that one chamber of the legislative branch seriously considered instructing a court of law about how to proceed in a core function of the judiciary—the contents of an opinion.

Congress certainly had a laudable goal prompting such contemplated interference with the Veterans Court’s decision-making process. As the House committee report accompanying its version of the bill makes clear, Congress is concerned about the high number of remands in the system and the corresponding delay that veterans experience.¹⁴⁰ However, congressional good intentions do not make up for the awkwardness associated with such potential interference with the operation of an independent court. There are many reasons in a given case for a court not to reach a given assertion of error raised

134. See *supra* Part II.A.

135. See 38 U.S.C. § 7251 (2000).

136. See United States House of Representatives Committee on Veterans’ Affairs, Committee Jurisdiction, <http://veterans.house.gov/about/jurisdiction.shtml> (last visited Jan. 27, 2009); United States Senate Committee on Veterans’ Affairs, Committee Jurisdiction, <http://veterans.senate.gov/public/index.cfm?pageid=9> (last visited Jan. 27, 2009).

137. See Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892, 110th Cong. § 202 (2008) (as passed by House, July 30, 2008).

138. *Id.* § 202 (emphasis added).

139. See Veterans’ Benefits Improvements Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145 (codified in scattered sections of 38 U.S.C.).

140. See H.R. REP. NO. 110-789, at 18–20 (2008).

by one of the parties. To take just one hypothetical example, a party may raise a constitutional issue that could be avoided by basing a decision on a procedural ground. If the House's proposal had become law, the Veterans Court would have been required by law to address that constitutional issue even though there is a well-established doctrine under which courts will avoid deciding constitutional questions if at all possible.¹⁴¹

In sum, the tension this bill reflects between Congress and the Veterans Court is an important feature of the current system.¹⁴² If Congress ultimately engages in such micromanagement of the Veterans Court, it would seriously undermine the actual or perceived independence of the body Congress created twenty years ago.

f. The Perception of the Veterans Court Outside of the System

The final significant drawback in the current system of judicial review of veterans' benefits determinations concerns the perception of the Veterans Court by those outside the system. The Court suffers from two types of perception problems that have the potential to limit its effectiveness. The first is that some courts do not understand the very nature of the Veterans Court. For example, in *Jackson v. United States*,¹⁴³ the United States Court of Federal Claims was faced with a complaint that sought, in part, to challenge the denial of a claim for veterans' benefits.¹⁴⁴ The Court of Federal Claims recognized that it did not have jurisdiction over the claim and turned to whether it could transfer the matter.¹⁴⁵ It determined it could not and, in reaching this conclusion, displayed a remarkable misapprehension of the status of the Veterans Court as reflected in its initial slip opinion in *Jackson* in which the court stated:

Both the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims are administrative agencies within the Department of Veterans Affairs, and 28 U.S.C. § 1631 does not permit transfer from this Court (or any court) to an administrative agency.¹⁴⁶

141. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

142. This tension is not new. In 1992, shortly after the Court's creation, the House Veterans' Affairs Committee sought to hold an "oversight hearing" for the Court, similar to hearings held for administrative agencies. See Nebeker Remarks, *supra* note 66, at 15. Chief Judge Nebeker indicated he would not appear and the committee did not press the matter. *Id.* This is yet another example of the difficulties inherent in the current system in terms of the relationship between Congress and the Veterans Court.

143. 80 Fed. Cl. 560 (2008).

144. *Id.* at 563.

145. *Id.* at 565–66.

146. *Jackson v. United States*, No. 07-713 C, slip. op. at 8 (Fed. Cl. Feb. 27, 2008).

This incorrect statement concerning the status of the Veterans Court remained in the Court of Federal Claims' opinion in *Jackson* through at least August 22, 2008.¹⁴⁷ Interestingly, the quotation set forth above does not appear in the version of the opinion appearing in the official Federal Claims Reporter even though there is no indication in that opinion that there was a change from the version that had been in place previously.¹⁴⁸

Such a fundamental misunderstanding of the Veterans Court's nature as reflected in the original opinion in *Jackson* speaks volumes about the misunderstood nature of this Article I court. It suggests at a minimum that the word has not spread sufficiently about what Congress sought to accomplish in the VJRA.¹⁴⁹

The second problem is more complex and, in some respects, at least partially the result of the Veterans Court's own actions. Specifically, the Veterans Court is seen as being sufficiently limited in the nature of relief it may award that its role is devalued. A lawsuit filed in the Northern District of California provides a useful example.¹⁵⁰ In 2007, several nonprofit organizations purporting to represent the interests of veterans who had served in Iraq, Afghanistan, and other theaters of operation filed a lawsuit against a number of federal government officials.¹⁵¹ Specifically, the plaintiffs sued the Secretary of the Department of Veterans Affairs along with several other high-ranking members of the Department, the Chairman of the Board of Veterans' Appeals, the Attorney General of the United States, and Veterans Court Chief Judge Greene.¹⁵² The plaintiffs challenged the veterans' benefits claims adjudication

147. A LEXIS printout of *Jackson* dated August 22, 2008, contains the same language incorrectly describing the Veterans Court. See *Jackson v. United States*, No. 07-713 C, 2008 U.S. Claims LEXIS 53, at *18 (Fed. Cl. Feb. 27, 2008) (dated Aug. 22, 2008) (on file with the *Catholic University Law Review*).

148. See *Jackson*, 80 Fed. Cl. at 566. In the bound volume this portion of the opinion reads as follows:

The Board of Veterans' Appeals is an administrative agency within the Department of Veterans Affairs, and 28 U.S.C. § 1631 does not permit transfer from this Court (or any court) to an administrative agency. Further, while the Court of Appeals for Veterans Claims is an Article I court rather than an administrative agency, it is not a "court" within the meaning of 28 U.S.C. § 1631.

Id. (footnote omitted) (citations omitted).

149. One could cite other illustrations as well. For example, in a litigation filed by a group of veterans dissatisfied with the overall VA adjudicative process, a United States District Judge displayed at least a subtle suspicion about the true nature of the Veterans Court. See *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at *20 (N.D. Cal. Jan. 10, 2008) ("Defendants claim that even though the [Veterans Court] is an Article I court, it is nevertheless independent from the VA, and is therefore insulated from any waiver of sovereign immunity under the [Administrative Procedures Act]." (emphasis added)). I discuss this case further in the next several paragraphs of this subpart.

150. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008).

151. See *id.* at 1055-56 (ruling on merits of claims after bench trial); *Veterans for Common Sense*, 2008 WL 114919, at *1-2 (ruling on motions to dismiss).

152. *Veterans for Common Sense*, 2008 WL 114919, at *1.

process on a number of constitutional and statutory grounds.¹⁵³ They sought declaratory and injunctive relief that would, if granted, have had a significant effect on how claims were adjudicated, at least within the Department.¹⁵⁴

Early in the litigation, the district court denied, in most respects, a motion to dismiss.¹⁵⁵ A significant rationale on which the district court based its decision was that the current claims adjudication process did not provide an alternative adequate remedy by which the plaintiffs could raise their system-wide claims before the Veterans Court.¹⁵⁶ The district court cited Veterans Court decisions interpreting the relevant statutes as limiting the Court to the adjudication of individual claims alone.¹⁵⁷

The district court was correct that the Veterans Court had interpreted the VJRA as limiting its ability to deal with such system-wide claims. For example, although the district court did not do so, it could have cited *American Legion v. Nicholson*¹⁵⁸ for the proposition. The issue in *American Legion* was essentially whether the Veterans Court had the authority to entertain a petition for a writ of mandamus filed by the American Legion instead of an individual veteran.¹⁵⁹ The Veterans Court held (four to three) that it was without jurisdiction to issue the requested writ and that the American Legion lacked standing to pursue its petition.¹⁶⁰ In particular, the Court determined that “Congress has expressly limited our jurisdiction to addressing only appeals and petitions brought by individual claimants.”¹⁶¹

In sum, there is evidence of a perception that the Veterans Court’s role is fundamentally limited. That perception is in part the result of the Veterans Court’s own decisions, so other actors cannot truly be faulted for their conclusions. Nevertheless, this perception—or perhaps better described, reality—is a weakness in the current system.

III. WHERE TO GO FROM HERE?: A LEGISLATIVE COMMISSION TO EVALUATE THE FUTURE OF JUDICIAL REVIEW OF VETERANS’ BENEFITS DETERMINATIONS

This Article has thus far described the current system for judicially reviewing veterans’ benefits determinations as well as the successes and

153. *Id.* at *2.

154. *Id.* The district court ultimately ruled against the plaintiffs after a bench trial. *See Veterans for Common Sense*, 563 F. Supp. 2d at 1091–92.

155. *Veterans for Common Sense*, 2008 WL 114919, at *1.

156. *See id.* at *7–10.

157. *See id.* (citing, *inter alia*, *Cleary v. Brown*, 8 Vet. App. 305 (1995); *Dacoran v. Brown*, 4 Vet. App. 115 (1993); *Erspamer v. Derwinski*, 1 Vet. App. 3 (1990)).

158. 21 Vet. App. 1 (2007) (en banc).

159. *See id.* at 2. The specific issue concerned the Secretary’s direction that the Board stay cases affected by the Veterans Court’s decision in *Haas*. *See id.* This issue was discussed earlier in this subpart. *See supra* text accompanying notes 121–34.

160. *See American Legion*, 21 Vet. App. at 8–9.

161. *Id.* at 8.

shortcomings of that system. This section considers what should be done as Congress's revolutionary experiment recently turned twenty. Specifically, this section proposes that Congress create an independent commission to evaluate the success of the 1988 VJRA and make recommendations concerning changes that should be considered in the system.¹⁶² It also outlines the core values that Congress should require the Commission to consider when performing its work.¹⁶³

Before addressing these matters, it is worth considering why such an evaluation should be undertaken at all. Some might argue that unless there are significant problems with the current system, there is no need to consider change at all. In more colloquial terms, "if it ain't broke, don't fix it." There are two responses to that point of view. First, the argument against a reevaluation misses the fundamental point of considering changes to this particular system. For most of the history of the United States there was no judicial review of veterans' benefits decisions.¹⁶⁴ That all changed with the enactment of the VJRA and the creation of the Veterans Court. Congress and President Reagan began a revolutionary journey in 1988. At the very least, the current political structure should take time to reflect on whether that revolution has been successful. The Veterans Court's twentieth anniversary provides an opportunity to do so.

Second, as outlined above, there are issues in the current system that call for some level of change.¹⁶⁵ I discuss these issues further in connection with the various options considered below.¹⁶⁶ The issues are ones that could be dealt with by making changes within the current structure or by making changes to the current structure itself, or both. In sum, then, reflection is warranted here both to be faithful to Congress's choice twenty years ago as well as to ensure that veterans are receiving the best review possible in the system.

A. A Proposal for a Legislative Commission

Congress should establish a "Commission to Study the Judicial Review of Veterans' Benefits Determinations" (the "Commission").¹⁶⁷ The Commission

162. See *infra* Part III.A.

163. See *infra* Part III.B.

164. See *supra* Part II.A (discussing judicial review prior to VJRA).

165. See *supra* Part II.C.2.

166. See *infra* Part IV.

167. It is also possible that the Commission could be established by the President through an Executive Order, as was done with the Dole-Shalala Commission. See *supra* text accompanying notes 3-6 (discussing report). Alternatively, the Commission could be a joint creation of Congress and the President. The key feature of the Commission must be that it is—and appears to be—independent of the Department. Although presidential creation or a joint body would be acceptable, congressional creation is the best way in which to ensure this independence given the Department's position as part of the executive branch. In any event, it is critical that the Commission should not be one controlled by the Department. This type of structure can work in certain situations. For example, in a recently enacted law, Congress directed the Department to

should be led by a chairperson or chairpersons who are widely respected and seen to be independent, particularly of influence from the Department. The leader or leaders of the Commission must also be politically savvy as well as capable of the follow through necessary to make the Commission's work meaningful in the real world.

The Commission should be composed of representatives from all the relevant constituencies affected by, and involved in, the award of veterans' benefits. These constituencies include veterans (and other claimants in the system), most likely represented through the various Veterans Service Organizations that exist (for example, the Paralyzed Veterans of America, the American Legion, the Vietnam Veterans of America, and others) although there could also be representatives of less traditional veterans organizations.¹⁶⁸ The constituencies also include the Department in all its facets (thus the RO adjudicators, the Board, the litigation arm of the Department, and the Secretary, probably through the Office of the General Counsel, should all be included); the Veterans Court; the Federal Circuit; and Congress itself. In addition, the Commission should have a member or members who are not aligned with any constituency but who have studied the process.

Congress should also ensure that the Commission has adequate resources with which to perform its functions. The Commission should be provided with a staff for, among other things, data collection and analysis, as well as space in which to work. It should also have sufficient funds available to allow the Commissioners to travel so that public hearings can be held to obtain the greatest input of views.

The Commission should be charged with evaluating the current state of appellate review of veterans' benefits determinations and making recommendations concerning changes that might be made to that system.¹⁶⁹ There should be no constraints imposed on the Commission with respect to the

create an Advisory Committee on Disability Compensation. *See* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 214, 122 Stat. 4145, 4152-54 (amending 38 U.S.C. § 546). Given the focus of this legislation on the claim process itself, situating an advisory commission within the Department makes sense. Such an entity would have the expertise on the process at this level of detail. The Commission I propose would have a charge that is far broader and concerns matters that go well beyond claims processing with respect to which the Department has special expertise.

168. For example, the Commission could include representatives of veterans groups that have fought against the current system such as Veterans for Common Sense or Veterans United for Truth, Inc., both of which were plaintiffs in the lawsuit filed in federal court in California challenging the VA claims adjudication process. *See* Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049 (N.D. Cal. 2008). Care would need to be taken in selecting such groups for inclusion on the Commission to ensure that they in fact represent a significant number of veterans or other claimants.

169. For specific examples of some options the Commission might consider, see *infra* Part IV.

options it might consider or propose, or both.¹⁷⁰ Finally, the Commission should be directed to submit a report to Congress within a defined period of time. That report should describe the Commission's activities, provide relevant background and statistical information, and set forth specific proposals for changes to the system warranted by the Commission's investigation.

B. Values the Commission Must Consider

As I described above, the Commission I call for should be given wide latitude to evaluate the current system of judicial review of veterans' benefits determinations and to make appropriate recommendations. No restrictions should be imposed on the Commission in terms of the solutions it might consider or propose. However, Congress should make clear that the Commissioners must be cognizant of three broad values when making their recommendations: (1) the interests of veterans; (2) institutional interests in the context of the American constitutional system of government; and (3) the public's interest in the process. This subpart briefly discusses each of these concerns in turn.

1. The Interests of Veterans

The paramount interest the Commission must consider is that of the veteran. The Nation should never forget—and I am confident none of the people involved in the process do—that the entire structure of veterans' benefits law exists for the purpose of providing support to the men and women who served this country. Thus, the Commission must ensure that it proposes nothing that harms the interests of the beneficiaries of the system.

Veterans' interests fall into five broad categories:

- *Accuracy*: Veterans have an interest in ensuring that decisions concerning the award of benefits be as accurate as possible. The gains in accuracy that have likely been achieved over the past twenty years, due in part to judicial review, should be preserved.
- *Fairness*: It is critically important that the system of awarding benefits and reviewing such decisions be both *fair* and *be perceived as being fair*. Veterans need to believe that the system provides an opportunity for their claims to be adjudicated in a manner that is, broadly speaking, consistent with the rule of law. Thus, the gains in the nature of VA decision-making (for example, better reasoned decisions) need to be preserved. In addition, the substantive fairness of the process needs to be preserved as well. Finally, one needs to be concerned with the speed of the decision-making process.

170. As described in the next subpart, the Commission should be required to consider certain systemic values when performing its work and making its recommendations. See *infra* Part III.B.

- *Transparency*: Closely related to fairness is veterans' interest in a transparent process. Largely as a result of the influence of the Veterans Court (although aided by Congress), the process of awarding benefits has become more open. That trend should be preserved.
- *Predictability*: It is important that veterans and their counsel (as well as the agency, of course) be in a position to predict how issues will be resolved. Of course there will always be a level of uncertainty in any legal system populated by humans. Nevertheless, the value of enhanced predictability of results is important for the system.
- *Finality*: No legal system can exist for long in any functional respect if disputes never come to an end. Veterans, as well as the VA, have an interest in having disputes resolved once and for all. The value of finality should not drive the system. There should be means of correcting errors, but those means need to be balanced against the interests of repose. Thus, finality itself is a value that should be considered when evaluating the current—or a future—system concerning the award of veterans' benefits and the judicial review of such decisions.

2. *Institutional Concerns*

A second interest that the Commission must consider concerns the preservation of American constitutional values. In particular, the importance in the American constitutional order of the maintenance of separate and independent centers of political authority must be a part of the Commission's deliberations. This is a structural concern.¹⁷¹ Thus, it is important to preserve an independent institutional check on the political branches' authority to award veterans' benefits.

The Veterans Court was created as an Article I tribunal,¹⁷² meaning that its members do not enjoy the tenure and salary protections afforded judges serving in the coordinate Article III judiciary.¹⁷³ Under well-established law, there is no structural constitutional violation flowing from the assignment of

171. I use "structural" in this context in contrast to the individual rights concerns that veterans might lodge based on constitutional principles such as due process or equal protection. Structural concerns go to the power relationships between and among the various centers of political authority in the American constitutional order; for example, the states and the coordinate branches of the federal government.

172. See 38 U.S.C. § 7251 (2000) ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.").

173. Compare U.S. CONST. art. III, § 1 (providing Article III judges with tenure during "good Behaviour" and salary protection), with 38 U.S.C. § 7253(c), (e) (setting terms of office and salary of judges of the Veterans Court).

the adjudication of disputes concerning veterans' benefits to such an Article I tribunal.¹⁷⁴ Veterans benefits are a "public right."¹⁷⁵ That is, entitlement to benefits flows from statutes instead of from the common law or the Constitution itself.¹⁷⁶ Congress has wide latitude to assign the adjudication of disputes concerning such public rights to non-Article III adjudicators such as the Veterans Court.¹⁷⁷

The structural and institutional concerns the Commission must consider are less formal than involving the Article III judiciary in the process to legitimize it.¹⁷⁸ Of course, Article III court review is one way to preserve institutional concerns regarding separation of powers, but there are other ways by which such power divisions can be established and maintained. The key is to provide a system of review with sufficient independence so that there is a meaningful check on the unilateral authority of the political branches.

3. *The Public Interest*

Finally, any consideration of the judicial review of veterans' benefits decisions needs to take into account the public's interest in maintaining a system that, while fair to veterans, also safeguards the great resources devoted to veterans and their dependants.¹⁷⁹ The public has a right to expect that the funds allotted to the Department for the payment of veterans' benefits are spent according to the directions of Congress and the President.

174. See *Smith v. Derwinski*, 1 Vet. App. 267, 273–74 (1991) (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985)).

175. *Id.* at 271.

176. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (1982) (opinion of Brennan, J.) (plurality opinion) (describing "payments to veterans" as an example of a public right (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932))); see also RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 370 (5th ed. 2003) (discussing Court's definition of public rights over time).

177. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855, 857 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590–91, 593–94; *Derwinski*, 1 Vet. App. at 272.

178. Of course, the Supreme Court must be involved under the terms of the Constitution itself. See U.S. CONST. art. I, § 8, cl. 9 (providing Congress with the authority to "constitute Tribunals *inferior to the supreme Court*" (emphasis added)). In addition, the Supreme Court has indicated, although not formally held, that some provision for meaningful Article III appellate review may also be constitutionally required. See, e.g., *N. Pipeline*, 458 U.S. at 69 n.23 (opinion of Brennan, J.) (plurality opinion) (noting that the Court had previously "suggested that [Congress] may be required to provide . . . for Art. III judicial review" when matters are assigned for adjudication to an actor outside the Article III structure (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455 n.13 (1977))).

179. For example, in 2006 the Department provided more than \$34 billion in disability compensation, death compensation, and pensions to veterans and their family members. Press Release, Department of Veterans Affairs, *supra* note 18.

IV. SOME COMMENTS ON THE COMMISSION'S SUBSTANTIVE WORK

As described in Part III, the legislative Commission this Article proposes should not be limited prospectively with specific policy choices or options for reform. To be faithful to this charge, the Article does not advocate that the Commission take any particular action. All relevant constituencies need a real voice in the process if any reform is to be successful.

This Part is designed to present potential options the Commission may wish to consider in its deliberations. I do strongly suggest that certain options be rejected, but by and large this Part does not make specific recommendations. The Article presents four broad options for reform. As explained below, only two of these possibilities are realistic given the values discussed above.¹⁸⁰

A. Option One: Make No Changes

One can forget that “staying the course” is itself a decision. In other words, not making any changes to the current system is an option in and of itself. So long as one makes this choice consciously, it is an entirely valid decision. Under this option, there would be no significant alteration to the system as currently structured.¹⁸¹ It is true that the current system of judicial review has had positive effects in the system as a whole.¹⁸² However, four factors lead me to conclude that simply staying with the current approach would not sufficiently protect the various values articulated above. Thus, in reality this option is not viable.

First, and probably most importantly, the volume of cases coming to the Veterans Court makes maintaining the current structure with no significant changes infeasible. In fiscal year 2002, there were 2150 cases filed at the court.¹⁸³ Only five years later, that number was 4644, a more than 100% increase.¹⁸⁴ As a result of this dramatic increase in cases, all recall-eligible retired judges of the court have been recalled for service.¹⁸⁵ There does not appear to be any realistic possibility that the upward trend in cases will change anytime soon. For this reason alone there needs to be some change in the system.

Second, as I have noted above and in other writings, the current structure of judicial review creates tensions between the Veterans Court and the Federal Circuit that have the potential to undermine the system as a whole.¹⁸⁶ The

180. See *supra* Part III.B. As I acknowledge below, these options are not exhaustive.

181. The current system is described above. See *supra* Part II.A.

182. See *supra* Part II.C.1.

183. VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50.

184. *Id.*

185. See Miscellaneous Orders 2007, *supra* note 54 (Nos. 23-07, 22-07, 16-07, 03-07, 02-07, 01-07) (six orders recalling retired judges).

186. See *supra* Part II.C.2.c; see also Allen, *Significant Developments*, *supra* note 11, at 523–26.

difficulties resulting from the relationship between these two courts include both doctrinal confusion on matters of law and additional delays for veterans and other claimants.¹⁸⁷ While perhaps not as practically significant as the caseload concerns at the Veterans Court, the inter-court relationship raises important concerns with maintaining the current system.

Third, as described above, the Veterans Court is often misunderstood or underappreciated as an institution by other judicial actors.¹⁸⁸ Perhaps the further passage of time would alleviate this concern, but there is no guarantee that this is the case. Thus, to ensure that the body adjudicating such important disputes has the respect necessary to make its judgments authoritative in a practical sense, it is necessary to move from the current structure in at least some respect.

Finally, the relationship between the Secretary and the Veterans Court makes maintaining the current system an untenable option. The Secretary often treats the Veterans Court in a way that is fundamentally inconsistent with the rule of law.¹⁸⁹ When a member of the executive branch of government takes action that amounts to defying the binding decisions of a judicial body,¹⁹⁰ there is a fundamental structural problem that must be addressed.

*B. Option Two: Return to the Days of "Splendid Isolation"*¹⁹¹

It is possible (theoretically at least) to argue for a return to the days in which there was effectively no judicial review of veterans' benefits decisions. I reject this option out of hand. As catalogued above, principally in Part II.C.1, the successes of judicial review in this area of the law have been significant. There are, no doubt, problems in the current system. However, those problems do not suggest that the entire system of judicial review should be abandoned when it has brought such important benefits. This option should be included in order to be thorough, but it is not viable.

C. Option Three: Maintain the Current System with Changes

Doing nothing or returning to a world in which there is no judicial review are not realistic approaches to the current state of veterans' benefits law. This subpart and the next discuss the two broad, and feasible, options that should be the focus of the Commission's work. This subpart discusses the first viable option: keeping the current structure in place but making changes within that

187. See Allen, *Significant Developments*, *supra* note 11, at 523, 527; see also *supra* note 62 and accompanying text.

188. See *supra* Part II.C.2.c.

189. See *supra* Part II.C.2.d (addressing cases in which the Secretary has ignored decisions of the Veterans Court).

190. See *supra* Part II.C.2.d.

191. See *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (noting that "Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation'").

system to address some of its shortcomings and future challenges. I describe four such changes below; each is relatively modest.

1. Permanently Increase the Number of Judges on the Veterans Court

Congress has already taken a first step toward reform by increasing the number of judges serving on the Veterans Court from seven to nine effective in December 2009.¹⁹² Such an increase will undoubtedly help in handling the influx of cases the Veterans Court has experienced. At the same time, it is unlikely that a modest increase in the membership of the Court would have a negative effect on the collegiality of the body, or its ability to shape veterans' benefits law with a single voice (at least subject to the Federal Circuit).¹⁹³ However, Congress has authorized the increase in judges only through January 1, 2013, at which point the Court would return to its current size absent congressional action.¹⁹⁴ Consideration should be given to making the expansion of the Veterans Court permanent.

2. Increase the Role of Lawyers Throughout the System

A second change focuses on the role of lawyers throughout the veterans' benefit system. As described above, the veterans' benefits system was designed to be non-adversarial.¹⁹⁵ Whether that is in fact the case is unclear.¹⁹⁶ Regardless of the true state of affairs, it would be possible to explicitly alter the system from the ground up to include lawyers. Congress has already taken such a step by removing the practical bar to hiring attorneys before the Board has issued a decision.¹⁹⁷ Further steps could be taken to provide for procedures at the RO level that are more akin to traditional adversarial processes. For example, one could adopt some form of formal discovery devices in place of, or in addition to, the current procedures under which the Department unilaterally provides information to the veteran.¹⁹⁸

Steps could also be taken at the appellate level in the Veterans Court to increase the role of lawyers. To be sure, proceedings at the Court are adversarial. The issue is that the Veterans Court has a high percentage of cases

192. See Veterans' Benefits Improvements Act of 2008, Pub. L. No. 110-389, § 601, 122 Stat. 4145, 4176–77 (amending 38 U.S.C. § 7253).

193. For a general discussion of the importance of collegial decision-making in appellate courts and a sampling of literature on the subject, see Allen, *Significant Developments*, *supra* note 11, at 518–19.

194. Veterans' Benefits Improvements Act § 601, 122 Stat. at 4177.

195. See *infra* Part II.C.2.b.

196. See, e.g., *supra* note 106 (discussing conflicting accounts of the nature of the VA adjudication process).

197. See The Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3405.

198. For example, the Department has duties to both notify veterans of certain information when they file a claim, see 38 U.S.C. § 5103(a) (2000), as well as to assist them in certain respects in connection with such a claim, see 38 U.S.C. § 5103A.

in which veterans proceed pro se. For example, in 2007, 53% of veterans appeared pro se at the time of the filing of an appeal.¹⁹⁹ That percentage declined by the time a decision was rendered, but was still significant at 19%.²⁰⁰ The Court and other organizations could increase their efforts to make pro bono representation available to pro se veterans.²⁰¹

Such changes throughout the system could provide important benefits. For example, veterans may have an increased sense of their due process rights if they perceive the playing field as being level. In addition, as the claims process has become more regularized through the Veterans Court's development of a uniform body of law, trained lawyers could increase the efficiency of the system at the appellate level. After all, lawyers are taught to take the law and apply it to the facts. Experienced representation of veterans earlier in the claims process may reduce the number of cases reaching the Veterans Court because errors could be identified and, one would hope, corrected at the agency level.

Yet the Commission must also consider the dangers inherent in increasing the role of lawyers. First, care must be taken to not alter the parts of the process that currently work well, unless there is an overall benefit to veterans. For example, the Department's duties to notify and assist veterans are important parts of the current process.²⁰² These duties should not be jettisoned unless Congress provides alternative protections for veterans. Second, it is important that one consider the system as a whole. Expanding the role of lawyers only at the non-agency appellate level could ultimately do more harm than good by exasperating the tensions already present when veterans move from a purportedly non-adversarial system to the more traditional adjudicative process at the Veterans Court.²⁰³ Finally, one needs to be aware of the potential for adding additional delay to a system that is already plagued by this problem.²⁰⁴ Ultimately, factors that might add delay are empirical questions that cannot be accurately predicted. Lawyers might actually speed the adjudication of claims. The Commission should study this matter to the extent feasible.

199. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50.

200. *Id.*

201. There are a number of organizations devoted to providing pro bono services to veterans, including the Veterans Consortium Pro Bono Program and the National Veterans Legal Services Program (NVLSP). See VETERANS BENEFITS MANUAL, *supra* note 20, at 9–12 (discussing NVLSP); The Veterans Consortium Pro Bono Program, <http://www.vetsprobono.org> (last visited Jan. 27, 2009) (discussing organization).

202. See *supra* note 194. For additional information concerning the duties of notice and assistance, see VETERANS BENEFITS MANUAL, *supra* note 20, at 884–901.

203. See *supra* Part II.C.2.b. (discussing the risk to veterans of transitioning to a more adversarial system); see also Allen, *Significant Developments*, *supra* note 11, at 526–28 (same).

204. See *supra* notes 93–104 and accompanying text (discussing problems associated with delays throughout the adjudication system).

3. Increase the Expertise of RO Adjudicators and the Efficiency of RO Adjudication

A third change focuses on the expertise of RO adjudicators and the overall efficiency of the RO adjudication system. All things being equal, increasing either or both of these items should improve the system. Congress recently took steps designed to address these issues at the RO level.²⁰⁵ The potential difficulty is that, as a congressional committee report has recognized, there may be only so much that can be done in the context of a “broken processing system.”²⁰⁶ In the end, it may be that there is little to be done to effectively alter the system given this history. The Commission should address this issue.

4. Adopt Streamlining Procedures at the Veterans Court

Finally, the Veterans Court could take internal steps to streamline its handling of the appeals it receives. For example, the Court might adopt a summary disposition rule, at least in cases in which claimants are not proceeding pro se.²⁰⁷ The Court could also adopt a more aggressive system of mediation, increase its use of electronic filing mechanisms, or amend its procedures for assembling critical materials such as the record on appeal.²⁰⁸ Each of these steps has at least the potential to reduce delay in individual appeals, as well as make the system more efficient overall.

* * * * *

The matters cataloged above are by no means exclusive. However, they suffice to illustrate the types of changes that could be implemented while maintaining the current structure of veterans’ benefits adjudication and review. As should be apparent, these types of devices would address in some measure concerns with overload and delay in the system. They would not alleviate concerns that go much beyond caseload. Thus, the attractiveness of such incremental changes is dependent on one’s views regarding the importance of the other concerns evident in the current structure. Suffice it to say, the Commission would need to balance all of these concerns when evaluating the current system as well as changes that might be desirable.

205. See Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892 110th Cong. §§ 103–05 (as passed by House, July 30, 2008).

206. H.R. REP. NO. 110-789, at 3 (2008).

207. See *Performance and Structure of the United States Court of Appeals for Veterans Claims: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. (2007) (written testimony of William P. Greene, Jr., C.J., U.S. Court of Appeals for Veterans Claims), available at <http://veterans.senate.gov/public/documents/Greene%20-%20Nov%207%2007.pdf> at 7–9 (discussing the costs and benefits of allowing summary disposition).

208. See *id.* (discussing all of these possibilities).

D. Option Four: Make Broad Changes in the Current System

The final reform option is to make broad changes in the current system of judicial review of veterans' benefits decisions. There are many ways in which one could significantly alter the current structure. For ease of reference, and as an aid to discuss many of the possible options, this subpart diagrams four structural scenarios. The scenarios discussed below are not exhaustive of the possibilities that exist. They are merely representative of the matters the Commission should consider. Moreover, it bears repeating that this Article does not necessarily endorse any of these changes. They are presented as part of the discussion I hope the Commission will begin in earnest.

Structural Scenario One

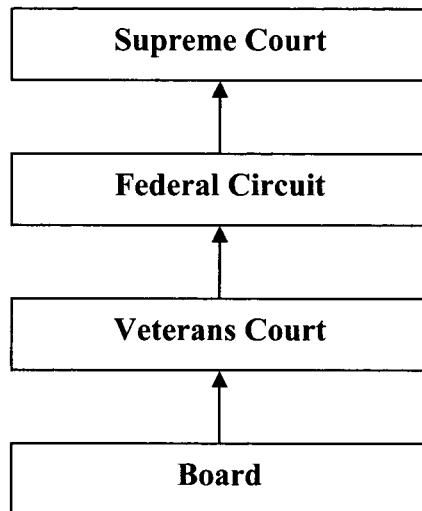


Fig. B

Scenario One, represented in Figure B above, is based on the assumption that the basic structure of review of veterans' benefits as it currently exists would remain in place. That is, the Board would render the final agency adjudication of a claim. There would then be an appeal to the Veterans Court, followed by review in the Federal Circuit and possibly in the Supreme Court through certiorari. Because the current structure remains in place in Scenario One, it would also be possible to include some or all of options mentioned above in connection with Option Three. What follows is a discussion of three potentially more significant changes that could be implemented in the context

of the current structure. Note that the changes discussed here are not mutually exclusive of one another. It would be possible to mix-and-match, so to speak, by adopting only some of them. The Commission, of course, would need to consider how adopting one type of change might alter the institution with respect to the adoption of another.

1. Article III Status for the Veterans Court

One potential change is to convert the Veterans Court from an Article I tribunal to a full-fledged Article III court. One could accomplish such a conversion to Article III status in at least two ways. First, one could maintain a role for the Federal Circuit and simply alter the status of the Veterans Court. In this respect, matters would be similar to the relationship between the Article III Court of International Trade and the Federal Circuit.²⁰⁹ Second, one could merge the Veterans Court into the Federal Circuit and convert the status of the current Veterans Court judges to conform to Article III's requirements. The latter option is not reflected in Figure B above. With respect to a merger, one would need to address the potential negative side-effect of losing subject-matter expertise that could flow from eliminating the Veterans Court as an independent entity.

As an initial matter, it does not appear that a conversion to Article III status is necessary to ensure the independence of the Veterans Court. By all appearances, the members of the Court consider themselves to be highly independent of political influence even though they do not have constitutional tenure or salary protection. Moreover, there has not, to my knowledge, been any suggestion that the judges of the Court lack the independence necessary to perform their important work. However, a conversion to Article III status would have serious implications in other contexts, both positive and negative, that should be the focus of the Commission's work.

a. Positive Effects of Article III Status

There are several potentially positive aspects of the Veterans Court's conversion to Article III status. First, a conversion would likely increase the level of respect for the Court both at the Department and in the current Article III judiciary. It is difficult to imagine that the United States District Court for the Northern District of California would treat a lawsuit against the Chief Judge of an Article III court, such as the Ninth Circuit or the Federal Circuit, in the same manner as it did in the suit against the Chief Judge of the currently

209. The Court of International Trade (CIT), reconstituted in its current form by the Customs Courts Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727, 1727, is an Article III tribunal whose jurisdiction focuses on a variety of trade-related matters. See generally United States Court of International Trade, About the Court, <http://www.cit.uscourts.gov/informational/about.htm> (last visited Jan. 27, 2009) (outlining the history and jurisdictional scope of the CIT). The Federal Circuit hears appeals from this court. See 28 U.S.C. § 1295(a)(5) (2000). Unlike the Veterans Court, the CIT is a trial level adjudicator. See *id.*

constituted Veterans Court.²¹⁰ Nor would the Court of Federal Claims misapprehend the nature of the Veterans Court if it were an Article III body.²¹¹

Second, it is unlikely that the Secretary would take actions in contravention of an Article III court's rulings in the same way he has done with the Veterans Court.²¹² Of course, there is no guarantee that the Secretary would deal with the Veterans Court in a more appropriate manner. Yet one is hard-pressed to find contemporary examples of an executive department's outright defiance of an Article III court's judgment.

Third, an Article III conversion would likely ameliorate some of the tensions and misunderstandings between the Veterans Court and the Federal Circuit, assuming these bodies remain separate.²¹³ As described above, the Federal Circuit has at times seemed to misunderstand the nature of the Veterans Court.²¹⁴ That may be forgiven considering the unique nature of that body. A conversion to a more traditional court would be more consistent with the relationship between the Federal Circuit and other courts.

Fourth, conversion to Article III status would address the at times uneasy relationship between Congress and the Veterans Court. As described above, Congress has, in some respects, attempted to exert influence over the Court in a manner that it would not do with respect to an Article III tribunal. For example, it is unlikely that Congress would seriously consider instructing an Article III court on the issues it must address when deciding a case.²¹⁵ Indeed, given that the judicial power vests in the Article III courts, it would at least be close to the constitutional line to do so.²¹⁶ Article III status for the Veterans Court would take these issues off the table.

Fifth, as an Article III tribunal, the Veterans Court would have easier access to resources that would assist it in matters such as recordkeeping, statistical analyses, and administration. As an Article I body, the Court is not an entity that is supported by organizations devoted to the judicial branch, such as the

210. See *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at *20 (N.D. Cal. Jan. 10, 2008) (refusing to dismiss the complaint against Chief Judge Greene as representative of the Veterans Court because the issue had not been raised in briefing). The district court later dismissed the case against the Chief Judge. Order Granting Defendants' Motion to Dismiss William P. Greene and Michael Mukasey, No. C-07-3758 SC (N.D. Cal. Mar. 13, 2008).

211. See *Jackson v. United States*, 80 Fed. Cl. 560, 566 (2008). *Jackson* was also discussed above. See *supra* text accompanying notes 142–46.

212. See, e.g., *Ribaudo v. Nicholson*, 20 Vet. App. 552, 553 (2007); *Ramsey v. Nicholson*, 20 Vet. App. 16, 39 (2006). Both *Ribaudo* and *Ramsey* are discussed in Part II.C.2, *supra*.

213. See *supra* Part II.C.2.c (discussing this tension); see also Allen, *Significant Developments*, *supra* note 11, at 523–24 (same).

214. Allen, *Significant Developments*, *supra* note 11, at 523.

215. See Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892, 110th Cong. § 202 (2008) (as passed by House, July 30, 2008).

216. See U.S. CONST. art. III, § 1 (providing for the vesting of the judicial power of the United States).

Administrative Office of United States Courts and the Federal Judicial Center.²¹⁷ This is not to say that the Court receives no support, but it is largely on its own. Coming within the Article III fold, so to speak, would decrease pressure on Court administrators to run and monitor the institution.

Finally, a conversion to Article III status might increase the broader influence of the Veterans Court. The Court unquestionably has significant influence in the veterans' benefits arena, which is to be expected. It is, after all, the exclusive venue for an appeal from a final Board decision.²¹⁸ However, the Court's work also addresses areas of importance beyond this niche. For example, the Court produces a number of decisions each year under the Equal Access to Justice Act.²¹⁹ In addition, the Court handles a high volume of pro se cases both at filing and at disposition.²²⁰ Both of these matters would be of interest to federal courts (and in some instances state courts). Yet, the Veterans Court is almost never cited outside of the Federal Circuit for the substance of its decisions.²²¹ Article III status could alter this state of affairs.

b. Potential Drawbacks to an Article III Conversion

There are also potential drawbacks of an Article III conversion of the Veterans Court that should be considered, although they do not appear to be as significant as the benefits of a conversion. First, introducing life tenure at the Court would reduce the turnover of its members. Thus, there would be less of an opportunity to introduce new ideas. This potential ossification is a significant issue with which the Commission will need to wrestle.

In addition, a conversion to Article III status would likely increase the political contentiousness of appointments to the Court. We have all seen in recent years the maneuvering that is attendant to appointment to life-tenured positions on federal courts.²²² Of course, there may not be as much political

217. The Administrative Office of the U.S. Courts describes its mission as supporting the judicial branch under the Constitution. See Admin. Office of the U.S. Courts, <http://www.uscourts.gov/adminoff.html> (last visited Jan. 27, 2009). The Federal Judicial Center explains that Article I tribunals are not a part of the judicial branch to which the FJC provides services. See Federal Courts Outside the Judicial Branch, http://www.fjc.gov/history/home.nsf/page/external_courts (last visited Jan. 27, 2009).

218. See 38 U.S.C. § 7252(a) (2000).

219. See 28 U.S.C. § 2412(d) (2000) (permitting the Veterans Court to award attorneys fees and costs to prevailing party). In the 2007 fiscal year the Court considered 1526 EAJA applications. VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50.

220. See VETERANS COURT 2007 ANNUAL REPORT, *supra* note 50 (reporting that in the 2007 fiscal year 53% of appellants were unrepresented at the time of filing and 19% remained unrepresented at the time of closure of the case).

221. A search for references to the Veterans Court in the LexisNexis database indicates that, with very few exceptions, the Court is discussed in connection with dismissing claims that are subject to the exclusive jurisdiction of the Veterans Court but that have been misfiled elsewhere.

222. See, e.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 977–78 (2007) (“In the last two decades, . . . confirmation battles informed by ideological divides have seemed more intense . . .”).

intrigue associated with a body of limited jurisdiction such as the Veterans Court, but there would almost certainly be more than there is at present.

Finally, a conversion to Article III status could have unintended consequences on the operation of the Veterans Court. If the Veterans Court were reconstituted as an Article III tribunal, all the restrictions on such bodies would apply to it. In the main, these restrictions—such as the standing doctrine and the prohibition on advisory opinions—would not alter the Court's work because it has already adopted them as a matter of policy.²²³ Nevertheless, Article III status could affect other aspects of the Veterans Court, and the Commission should consider those effects. For example, the Veterans Court currently has exclusive jurisdiction to consider appeals from final Board decisions.²²⁴ As an Article III tribunal, without a statutory restriction, the Veterans Court also would arguably have full authority to adjudicate additional claims for which jurisdiction is based on supplemental jurisdiction.²²⁵ This is the state of affairs with certain other Article III specialty courts.²²⁶ Of course, the Veterans Court is an appellate body,²²⁷ which might alter the analysis. On the other hand, it is the first link in the judicial process, making it similar to the CIT.²²⁸ At the very least, the Commission should carefully consider the jurisdictional effect of an Article III conversion.

2. *Expansion of Federal Circuit Jurisdiction*

Another option for broad reform within the context of the current system is to alter the appellate jurisdiction of the Federal Circuit. As it currently stands, the Federal Circuit's jurisdiction is essentially limited to reviewing questions of law;²²⁹ it is precluded from reviewing, in most cases, challenges to factual matters or the application of law to fact.²³⁰ As I have described above and

223. See, e.g., *Norvell v. Peake*, 22 Vet. App. 194, 200 (2008) (setting forth Court's decision to abide by Article III's prohibition on issuing advisory opinions); *In re Stanley*, 9 Vet. App. 203, 209 (1996) (adhering to the standing requirement); *Mokal v. Derwinski*, 1 Vet. App. 12, 14–15 (1990) (adopting case or controversy requirements for the Court).

224. See 38 U.S.C. § 7252(a) (2000).

225. See 28 U.S.C. § 1367 (2000).

226. For example, the CIT has exclusive jurisdiction to adjudicate disputes concerning a number of matters related to trade. See 28 U.S.C. § 1581 (setting forth the court's exclusive jurisdiction). It also has the power to adjudicate claims beyond those matters over which it has exclusive jurisdiction if, for example, supplemental jurisdiction applies. See, e.g., *Salmon Spawning & Recovery Alliance v. U.S. Customs and Border Protection*, 532 F.3d 1338, 1350 (Fed. Cir. 2008) (discussing CIT's jurisdiction under § 1367).

227. See *supra* Part II.A (describing Veterans Court and its appellate nature).

228. Compare 38 U.S.C. § 7252(a) (establishing the appellate role of the Veterans Court), with 28 U.S.C. § 1581 (establishing the role of the CIT in various trade disputes).

229. See 38 U.S.C. § 7292(d)(1).

230. See 38 U.S.C. § 7292(d)(2).

elsewhere, this rather odd jurisdictional grant has caused certain difficulties in the current system of judicial review of veterans' benefits decisions.²³¹

If the current structure remains in place, the Federal Circuit's jurisdiction could be expanded to mirror that of most appellate bodies. Under this option, the court would have plenary jurisdiction over alleged errors below and would apply traditional rules for judging those alleged errors.²³² This change would help address some of the current disconnects in the system between these bodies. On the other hand, it would also raise the possibility of greater delay in an already prolonged process, as review at the Federal Circuit became more sweeping. Expanding the Federal Circuit's review would also potentially have a negative effect on the fundamental utility of the Veterans Court to be an expert lawmaker in the veterans' benefits arena. That role would effectively be transferred, in many respects, to the Federal Circuit. These are all matters the Commission would need to address in its investigation.²³³

3. *Expansion of Veterans Court Jurisdiction and Powers*

Finally, one could maintain the current system but alter the jurisdiction or powers, or both, of the Veterans Court. There are many ways this type of change could be accomplished. This subpart describes only two potential alterations: expanding the Veterans Court's jurisdiction to make factual determinations in some situations and creating a procedural mechanism, or mechanisms, by which the Veterans Court may adjudicate aggregate litigation. The scope of potential changes is undeniably much broader and should be the subject of Commission discussion.

At present, Congress has precluded the Veterans Court from making factual determinations; the Board serves as the trier of fact.²³⁴ This state of affairs is beneficial for a number of reasons, including regulating the workload of the Court. A downside of the current approach, however, is that it builds delay into the system because the Court must remand matters to the Board instead of itself making an initial factual determination.²³⁵

If the Commission were to recommend expanding the power of the Court to allow it to make factual determinations, it would need to wrestle with the implications of such a decision on the nature of the institution. For example, what would such an expansion do to the workload of the body? Similarly, would such an alteration merely change where delay occurs, instead of reducing the time to decision? The point is that a change that looks relatively

231. See *supra* Part II.C.2.c; Allen, *Significant Developments*, *supra* note 11, at 523–24.

232. For example, questions of law would be reviewed *de novo*, factual determinations would be reviewed under the clearly erroneous standard, and the like.

233. I discuss the option of reducing or eliminating the role of the Federal Circuit later in this subpart in connection with Structural Scenario Two.

234. 38 U.S.C. § 7261(c) (“In no event shall findings of fact made by the Secretary or the [Board] be subject to a trial *de novo* by the Court.”).

235. See *supra* Part I.C.2.a (discussing delays in the current system).

simple on paper can have rather significant consequences on the ground. Charting out what those consequences will likely be should be a critical function of the Commission.

The Commission could also consider providing for the Veterans Court to hear aggregate litigation. The Court has been reluctant in several respects to interpret the law to allow it to address such collective litigation.²³⁶ Congress could provide that, in at least certain situations, the Court would have the unquestioned authority to consider matters beyond an appeal of a single Board decision by a single claimant. For example, Congress could direct the Court to consider adopting a class action rule. The details of such a rule would be a matter for close study and debate. The goal of the rule, however, would be to identify those types of matters in which the resolution of a group of cases together would advance the goals of the system overall.

Structural Scenario Two

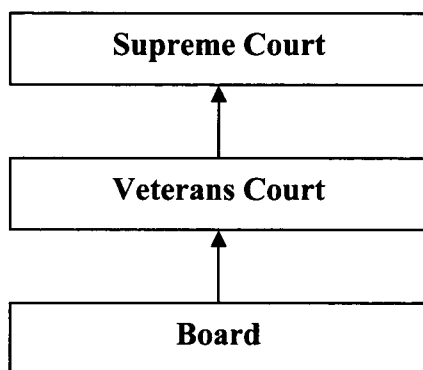


Fig. C

Scenario Two, depicted in Figure C above, moves away from the current structure of judicial review of veterans' benefits decisions by removing the Federal Circuit from the mix entirely. An advantage of this approach is that it eliminates the drawbacks associated with the current two-layer system of appellate review with odd jurisdictional restrictions.²³⁷ A potential negative

236. See, e.g., *Am. Legion v. Nicholson*, 21 Vet. App. 1 (2007) (en banc) (dismissing petition for writ of mandamus in part because a veteran service organization was not a proper party before the Court); *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (rejecting the Court's authority to consider class actions).

237. See *supra* Part II.C.2.c (discussing relationship between the Veterans Court and the Federal Circuit as well as the problem of delay in the current system); see also Allen, *Significant Developments*, *supra* note 11, at 523–24 (discussing the relationship between the Veterans Court and the Federal Circuit).

effect of removing the Federal Circuit is that doing so would reduce the input from members of the third branch of the federal government in the process. As I mentioned above in connection with the values the Commission should consider, such participation is not mandated (at least not below the Supreme Court level).²³⁸ However, even if not required, there may still be important constitutional values at stake that need to be confronted when contemplating the removal of the Federal Circuit from the process.

The Commission could likely satisfy those constitutional concerns by converting the Veterans Court to an Article III body. But that is not necessary to validate this structure. For instance, the United States Court of Appeals for the Armed Forces is an Article I tribunal from which the only appeal is by writ of certiorari to the Supreme Court.²³⁹

Structural Scenario Three

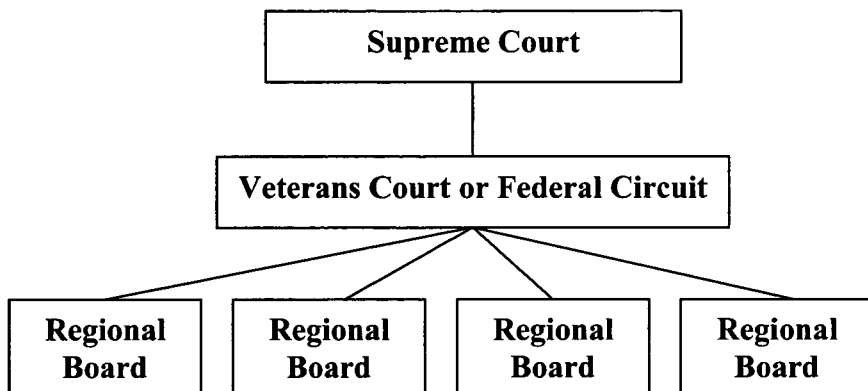


Fig. D

Structural Scenario Three, depicted in Figure D above, alters the current system principally at the level below the Veterans Court, that is, within the Department. In this scenario, judicial review at the appellate level is at the Veterans Court or the Federal Circuit. The Commission could maintain the current two level system of appellate review, eliminate the Federal Circuit, or even merge the Veterans Court with the Federal Circuit in some fashion. However, the focus of this scenario is change at the Board level.

238. See *supra* Part III.B.2.

239. See 10 U.S.C. § 941 (2000) (stating that the Court of Appeals for the Armed Forces is established under Article I); 28 U.S.C. § 1259 (2000) (granting Supreme Court review, by certiorari, for certain decisions of the Court of Appeals for the Armed Forces).

Many changes at the administrative level, both at the Board and the ROs, could be accomplished without altering the current system. Some examples of such changes were discussed above.²⁴⁰ The specific suggestion reflected in Scenario Three is more fundamental. It presents the option to regionalize the Board. The country (and relevant extra-territorial locations)²⁴¹ would be divided into a certain number of regions. Decisions of ROs in each region, to which NODs were filed, would be appealed to a Board for that region. Appeals from adverse decisions of each of those Regional Boards would lie with the Veterans Court (or Federal Circuit depending on the structure of appellate review).

The driving force behind this Scenario is a potential increase in efficiency of the administrative system. It is possible that regionalization of the Board would make the claims adjudication process within the Department more efficient for at least some veterans.²⁴² Of course, it is also possible that such a change would only engender further inefficiency and delay. In addition, a growing lack of uniformity in the law as applied at the agency level might occur, even with a watchful appellate body such as the Veterans Court further up the chain of review. The Commission should carefully study the potential implications of such a change but it should not be off the table for discussion.²⁴³

240. *See supra* Part IV.C.

241. There is an RO located in the Philippines. *See* U.S. Dep't of Veterans Affairs, Facilities Locator & Directory (Oct. 2, 2008), <http://www.va.gov/directory/guide/home.asp>.

242. *See* H.R. REP. NO. 110-789, at 7 (noting increased claims backlog and processing times).

243. This Scenario is also a reminder that a consideration of judicial review of veterans' benefits decisions cannot realistically be limited to appellate judicial tribunals alone. The process starts with line adjudicators and includes agency appellate review.

Structural Scenario Four

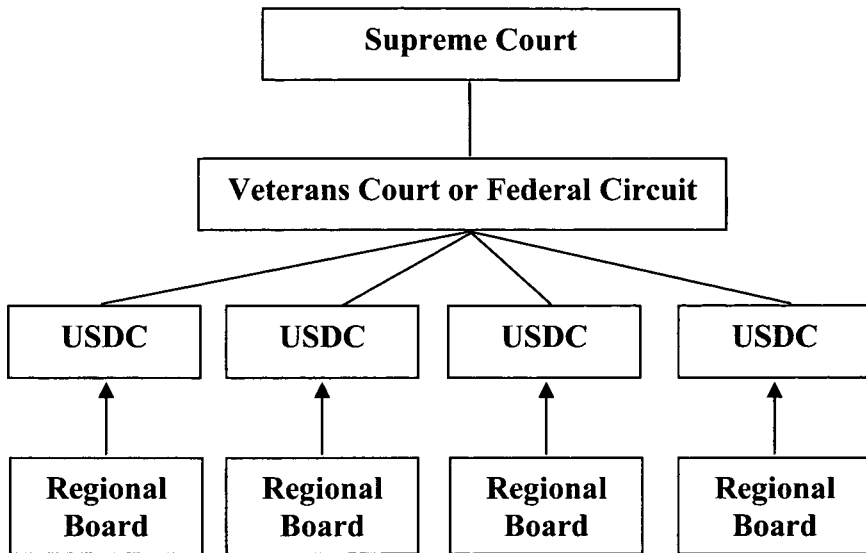


Fig. E

Scenario Four, depicted in Figure E, continues the theme of Scenario Three by focusing on the bottom of the claims adjudication process. The same caveats discussed in connection with Structural Scenario Three above, concerning the box labeled “Veterans Court or Federal Circuit,” apply equally in this Scenario. The difference here is that review of Board decisions is initially had in the regional federal district courts.²⁴⁴ Appeals from such district court determinations would be to an appellate body, either the Veterans Court or the Federal Circuit or some combination thereof.²⁴⁵

244. Figure E indicates that the district courts would review decisions of the Board divided into regions. This Scenario could also be structured in the same manner if the Commission did not regionalize the Board. The only significant difference would involve the technical determination of which district court would be a proper venue for a given appeal from a centralized Board. All such decisions could be funneled to the United States District Court for the District of Columbia. Alternatively, district court venue could be based on the location of the RO with which the veteran initially filed her claim.

245. The system envisioned here is in many respects similar to the system currently in place concerning judicial review of decisions denying Social Security benefits except that appeals from the district courts would not be made to the regional courts of appeals. See 42 U.S.C. § 405(g) (2000) (providing basis for a dissatisfied Social Security claimant to obtain review of benefits denial in federal district court). As I acknowledged previously, *see supra* text accompanying note 185, the Commission might consider a similar approach in connection with veterans benefits matters as well.

In most cases it is possible to pick and chose from the various alterations discussed in this Article. However, if this Scenario were adopted, and the Veterans Court was maintained in the chain of review, the Commission would need to recommend conversion of that body to an Article III tribunal. It could still be independent of the Federal Circuit (although it need not be). However, the system would face serious constitutional issues if an Article III court's determination (that is, the U.S. district courts') were reviewed and potentially altered by an entity outside of the Article III structure.²⁴⁶

There are at least three potential advantages of including district courts in the process. First, it could possibly reduce the number of appeals at the Veterans Court, because it is likely that not every case would be appealed from the district court to an appellate judicial body. Veterans would have the ability to have a check independent of the Department and would not necessarily feel compelled to seek such review in the Veterans Court. Second, on a system-wide basis it might reduce the time to decision in at least some cases.²⁴⁷ Third, district court review would provide a potential forum for fact finding and development outside the agency if such additional factual analysis were provided by statute. Moreover, this forum is one experienced in taking testimony, reviewing documentary evidence, and generally making factual determinations.

There are also potential drawbacks associated with adding the district courts to the process. First, as highlighted above in this subpart, such a change would require that the Veterans Court be converted to an Article III tribunal. Second, and most significantly perhaps, the inclusion of another layer of decision-maker might actually add to delays in a system already plagued by them. This is, at its core, an empirical question that the Commission would need to consider. Another potential negative is the inclusion in the system of an adjudicator lacking expertise in veterans' benefit law. This is certainly an issue of concern in the short run. It would become less so as district court judges became more familiar with this area of the law. Finally, the Commission should be concerned about increasing the workload of the federal district courts. These entities are already heavily burdened.²⁴⁸ Any increase in their jurisdiction would need to be carefully considered.

246. See *Hayburn's Case*, 2 U.S. (Dall.) 409, 413 (1792) (holding that federal courts could not participate as commissioners in awarding veterans benefits when their decisions would be subject to revision in an executive agency); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (recognizing that *Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch").

247. As acknowledged below, adding an additional layer of decision-making also has the potential to *increase* delay in the ultimate resolution of claims.

248. For example, in fiscal year 2007 there were 257,507 filings in the United States district courts. See 2007 JUDICIAL BUSINESS, *supra* note 52, at 139 tbl. C.

* * * * *

This Part has outlined some of the more potentially significant changes that could be made in the current system of judicial review of veterans' benefits decisions. It bears repeating that this discussion has not exhausted the options the Commission should consider. For example, each of these proposals maintains a narrow focus on veterans' cases. One could also add to any one of these scenarios additional areas of the law to be grouped with veterans' benefits. For example, one could reconceive the "Veterans Court" as a "Disability Court" and include within its bailiwick matters such as social security. Such a change would be far reaching indeed and would require serious consideration. While I am not yet in a position to take a definitive stance, my initial reaction is that such a change would not be beneficial. Veterans' benefits law is unique—or at least unique enough—such that expertise is important. I fear that such expertise would be diluted for insufficient gain. That being said, this option should not be ruled out at least from consideration by the Commission this Article proposes.

Another example is the elimination of a court focused only on the discrete area of veterans law.²⁴⁹ Instead of such a specialty court, appeals of Board decisions could be channeled into the district courts, or perhaps even the regional courts of appeals. Such a change would be quite a significant shift from the pattern of the past twenty years. I fear that it would dilute the uniformity and richness of the law in this area. It would also add to the workload of the general federal bench. Nevertheless, the option should be available to the Commission.

V. CONCLUSION

We are at a critical juncture concerning how we as a nation provide for our veterans. Congress took a revolutionary step twenty years ago when it created the Veterans Court. It is now time to take the next step and assess the success of that endeavor. This Article has proposed a legislative commission as the most appropriate means to do so.

In the end, I am not sure that a Commission, such as this Article proposes, is politically viable. There are many competing points of view (even if one assumes that all constituencies have veterans' welfare as a main goal) and a large amount of money is at issue. Yet, I am sure that such a Commission is

249. There is a vast body of academic literature concerning the wisdom of specialty courts. See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

necessary if we are to be faithful to President Abraham Lincoln's call to honor those who have served this country.²⁵⁰

250. See *supra* text accompanying note 2 (quoting President Lincoln's Second Inaugural Address).